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CONTEMPT ORDERS AND JUDICIAL "ATTACHMENT" OF EQUITABLE PROPERTY

Jurisdiction, Recognition or Choice of Law?

This article argues that a foreign contempt order is ordinarily not a judicial act and, therefore, not a fit subject for recognition by the domestic court as a final and conclusive judgment. It is an exercise of enforcement jurisdiction giving rise to concerns of extraterritoriality. Such orders are to be dealt with not in terms of abstention from exercising jurisdiction in cases which involve an attack on the validity of an act of a foreign nation state. They involve a different question of jurisdiction, the denial of jurisdiction to make orders absent reasonable connection. Concerns of non-justiciability may also exist and doctrines of act of state may also be relevant. In particular, a contempt sanction purporting to affect the contemnor's beneficial interest in property may also implicate choice of law considerations, calling for the domestic court's exercise of jurisdiction to protect pre-existing rights accrued under the domestic *lex fori* as well as those derived by imputation or ascription from applicable law.

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I. Introduction

1 The recent case of *The Republic of the Philippines v Maler Foundation*[1] ("*ROP v Maler Foundation*") considered the obscure question whether effect could be given to involuntary judicially enforced beneficial transfers of property but left a concluded opinion for another day. The particular transfer in that case was an "attachment", as it were, of the beneficial interest by way of assignment as a sanction for contempt of court. Such sanctions for contempt of court are uncommon. This article will discuss a number of questions to which they give rise such as: (a) whether there is a special quality in contempt orders that should make a difference between attachment for contempt and other involuntary public law transfers; and (b) whether the fact that the beneficial interest is involved and not legal ownership makes or should

1 [2014] 1 SLR 1389.

make a difference. The significance of answers to these questions is not to be underestimated although the particular questions addressed are uncommon. What they reveal is a larger issue of general relevance about whether the conflict of laws is well equipped to deal with involuntary public law transfers. The same quest for answers has to be pursued for other involuntary public transfers of title such as those effectuated under the UK Trading with the Enemy Act 1939,[2] Fraudulent Conveyance Act or the UK Financial Services and Markets Act 2000.[3] Such transfers are also increasingly common where settlors who have secreted their wealth in overseas asset protection trusts are ordered to repatriate their assets for the purposes of satisfaction of judgment awards against them.[4] The answers sought will not, however, be needed for contractual "transfers" coerced by a public authority. Those are regarded as consensual and to be dealt with in terms of choice of law rules for contract.[5]

2 For the sake of addressing the more general issues which are raised in the first part,[6] the discussion in the second part of the article[7] contains an appraisal of the three essential processes for solving conflict of laws problems. These are the jurisdictional, choice of law and recognitional analyses. Others which are interpolated under these essential analyses include public international law rules internalised or engrafted into the conflict of laws.[8] Jurisdictional analysis looks at the relevance and impact of exercise of public authority and power on private justice. It, of course, defines and prescribes the jurisdictional space in which choice of law considerations are operative. But it also plays a crucial role in mediating between regulatory state interests for the sake of private justice. Choice of law analysis seeks to make a choice

2 c 89. Cases on s 4 of the UK Trading with the Enemy Amendment Act 1916 are illustrations of how exceptional divestment is even when what is divested is the legal ownership for a season. The extinguishment of legal ownership of an enemy or hostile person of course is not a confiscation. Its purposes are preservative and temporary, to last merely for the duration of hostilities. See also *Wilderman v FW Berk & Co* [1925] Ch 116. For trust cases involving Trading with the Enemy Act 1939 (c 89), see *Re Hall* [1944] Ch 46; *Re White, deceased* [1944] Ch 166; *Re Schar, deceased* [1951] Ch 280, holding that the Custodian of Enemy Property became entitled to the trust income.

3 c 8; see also *Brazzill v Willoughby* [2010] 1 BCLC 673.

4 See *Federal Trade Commission v Affordable Media LLC* 179 F 3d 1228 (9th Cir, 1999); *Re Lawrence* 279 F 3d 1294 (11th Cir, 2002).

5 These are also rare. In *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, only one member of the English Court of Appeal described the finalisation agreement as a confiscation. It is likely that he was referring merely to the surrender of the performance bond.

6 Paras 9–25.

7 Paras 26–57.

8 The language is taken from *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 490, where Lord Atkin described two propositions of international law as being "engrafted into our domestic law".

between relevant legal solutions to the same problem of legal rights and duties, for the sake of appropriateness and situationality. Appropriateness concedes the absence of a right answer in legal substantive solutions while situationality acknowledges the importance of situating the problem in one legal order to the exclusion of others. Recognitional analysis is different again. It considers the relevance and weight of a prior exercise of adjudicative authority for the purposes of achieving finality in private justice. Each aspect of the international conflicts problem is, thus, different. Two aspects may interweave or intrude on one another but a fundamental point when it comes to operational characteristics is that each inhabits different dimensions or domains along the same plane. No analysis is moving up or down one level although one may be anterior and another posterior.

3 In the third part,[9] this article argues after a brief discussion of the choice of law process that involuntary beneficial transfers straddle the boundaries of jurisdiction and choice of law and concludes that the answer to the problem of contempt orders is a two-tiered analysis in which the jurisdictional analysis plays the primary role with an embedded secondary role for choice of law. First, the making of a contempt order depends on an exercise of enforcement jurisdiction and the jurisdictional analysis is right to ensure that it falls within the metes and bounds of international law jurisdiction. If it does, the domestic court will not block it and the order can be served on third parties in the domestic forum for such effects as may be created in the foreign court. But then, there may be a subsidiary choice of law question whether the contemnor or implicated third party has rights which the order denies but which are exercisable because the domestic court has jurisdiction to vindicate those rights on his behalf. The arguments in support are situated in the context of the Court of Appeal decision in *ROP v Maler Foundation*.

II. *ROP v Maler Foundation* in outline

4 In *ROP v Maler Foundation*, there were conflicting claims to proprietary interests in certain deposits which had been transferred from Swiss Banks to an account of the Philippine National Bank ("PNB") held at WestLB AG ("WestLB") in Singapore. This account was held on escrow pending determination by the Supreme Court of the Philippines ("SCP") as to ownership of the deposits. The deposits were allegedly the ill-gotten gains of the former President Ferdinand Marcos of the Republic of the Philippines and the competing claims were made in interpleader proceedings initiated by WestLB. The initial competing

9 Paras 58–70.

claimants were: (a) several Foundations as nominee legal owners holding for the Marcos Estate; (b) PNB as account holder and escrow agent; and (c) the successful judgment creditors (victims of the ex-President Marcos's human rights violations, hereafter "HRVs") of the defendant Marcos Estate. The Philippines was a relative latecomer. Its purported interest in the funds was derived from SCP's judgment that the moneys in the Swiss accounts were forfeited to the Philippines. Relying on that judgment, the Philippines first intervened in 2006, claiming sovereign immunity in the interpleader proceedings in respect of the deposits and seeking a stay of the proceedings with an added prayer for release of the deposits.[10] If the claim to sovereign immunity had succeeded, that would have been the end of all the competing claims in Singapore. But not only did it not succeed,[11] the Philippines found itself to have voluntarily submitted to the jurisdiction of the Singapore court.[12] As a result, it became a party to the interpleader proceedings whether it had intended this or not.[13]

5 In the resumed substantive hearings, there were, therefore, four claimants including the Philippines as the fourth claimant. The trial judge rejected all claims and held for PNB. On appeal, the Court of Appeal, agreeing with the trial judge, first dealt with the Philippines' claim which was based on the *in rem* judgment of SCP. The claim was rejected on the ground that the judgment had been pronounced over property outside the jurisdiction of the Philippines.[14]

6 The interest in this article is in the claims made by the HRVs, who relied on the "Chinn Assignment" as the authentic source of their property rights in the deposits. The HRVs who had sued the defendant Marcos Estate to success in the US had the benefit of ancillary *Mareva* protection over all the defendant's assets including the Swiss accounts. Following contempt of court through violation of those orders, Walter Chinn, Clerk of the US District Court ("DC") for Hawaii, signed the

10 After its writ of execution was met with interpleader relief by WestLB AG.

11 See *Republic of the Philippines v Maler Foundation* [2008] 2 SLR(R) 857.

12 The added prayer proved to be a problem. It amounted to waiver of sovereign immunity, as by it a step had been taken in the proceedings which was only meaningful if there was recognition of the jurisdiction of the court. It was not necessary to consider whether the step had been taken in ignorance of facts entitling the claim to immunity. Clearly, no issue of ignorance of factual entitlement arose.

13 In any event, the court decided that if the interest of the Philippines was to be considered, the Philippines would have to be joined as a party in the proceedings since no sovereign immunity existed in relation to the claim being made to an interest in the escrow funds.

14 This aspect of the judgment was the subject of an article: see Tan Yock Lin, "Enforcement/Recognition of Foreign Confiscatory Laws in Singapore" [2015] Sing JLS 162.

Chinn Assignment at the direction of the DC purportedly assigning all right, title and interest of the Marcos Estate in the Swiss accounts to Robert Swift (hereafter "the Chinn assignee") for the benefit of the HRVs.[15] This occurred prior to the transfer of the deposits to WestLB in Singapore. Apparently, the fact was not drawn to the attention of the Singapore Court of Appeal that a prior attempt by the HRVs to obtain a declaration from a US court that the Chinn Assignment was valid and binding on the pertinent Swiss Banks failed.[16] It was held that the declaratory order would violate the act of state doctrine as it "would not only contradict, and therefore declare invalid, the Swiss freeze orders, but would also require the Banks to disregard the Swiss orders".[17]

7 Before the Court of Appeal in *ROP v Maler Foundation*, the HRVs contended that the Chinn Assignment was valid and binding on WestLB and all competing claimants (it was implicit in their case that this was whether or not WestLB stood in the position of the Swiss Banks). Presumably, as there was no longer any question of the Swiss Banks being affected by the Chinn Assignment, all parties and the court assumed that the contention simply called for a choice of law question to be determined. The court reviewed a range of possible connecting factors, looking for the most appropriate connecting factor to identify the applicable law. Four models were considered as possible models of analogy. The analogy to a voluntary assignment of contractual choses in action suggested the *lex actus*, *lex situs*, proper law of the debt and residence of the parties as possible connecting factors "depending on the specific legal question before the court".[18] If the case was akin to recognition of foreign judgments *in rem*, "the applicable connecting factor would appear to be the *lex situs*".[19] If the case should be likened to cases in which the rules relating to legislative or executive confiscation of property were applicable, "the connecting factor would either be the *lex situs* or the proper law of the debt".[20] Lastly, if the true analogy was with the judicial garnishment of a debt, the court thought that "the appropriate connecting factor [would] generally [be] the *lex situs*".[21]

15 This author is very grateful to an anonymous referee for providing him with a softcopy of the pertinent Order for Additional Relief and the Chinn Assignment.

16 *Credit Suisse v US District Court for Central District of California* 130 F 3d 1342 (9th Cir, 1997).

17 *Credit Suisse v US District Court for Central District of California* 130 F 3d 1342 at 1348 (9th Cir, 1997). It is deducible from the judgment that the HRVs did not first attempt to rely on the Chinn Assignment as binding the Swiss banks but sued out writs of execution and notices of levy delivered to the banks' offices in California. In *Hilao v Estate of Marcos* 95 F 3d 848 (9th Cir, 1996), the Court of Appeals held that these were void for want of jurisdiction.

18 *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [87].

19 *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [87].

20 *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [87].

21 *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [87].

8 It is enough to add that there is a curious blending of conflictual processes in two of the four models. First, the reference to the *lex situs* as a connecting factor under the judgment model is only true of judgments given in respect of immovable property. It is not true of an *in rem* admiralty judgment where the rendering court may apply an applicable law other than the *lex situs*. Moreover, a recognition model will not essentially involve a choice of law process since the recognising court accepts as final and conclusive the choice of law determination, if any, by the rendering court in the situs of the property. So, describing the connecting factor as the *lex situs* overstates the position. Second, the reference under the garnishment model to the *lex situs* also overstates the position since, as will be shown, the court is only concerned with the international jurisdiction to garnish a third-party debt situated out of the jurisdiction. If there is no international jurisdiction, the order will be refused and it matters not that the third-party debtor will be regarded as discharged from the debt under the applicable law of the debt.[22] In truth, then, it is not the diversity of connecting factors that is significant but the diversity of jurisdictional, recognitional and choice of law processes. What has to be decided is a question of the appropriate process and this article proceeds accordingly to discuss these processes.

III. Compelled judicial beneficial transfer as contempt sanction

A. As "equitable" sanction

9 Aside from process considerations, it is important to appreciate the exact nature of the involuntary public transfer for which a choice of conflicts process is to be found. There is nothing special or peculiar about title obtained by way of involuntary transfers as between private parties, of which theft and involuntary alienations to a creditor of a debtor's beneficial interest are common examples.[23] Such transfers occur, if at all, in accordance with the *lex situs* or the governing law of a trust under a choice of law analysis.[24] Thus, the re-vesting of beneficial ownership of stolen property in the owner under a constructive trust will be recognised if it is prescribed by the *lex situs*. Where a competent court in *in personam* proceedings has affirmed the plaintiff's title to sue, awarding him damages for interference with his possession of movable property, there is also no doubt that the *in personam* judgment will be recognised and enforced in the domestic forum. The judgment as a judicial act may be recognised if the defendant had a sufficient physical

22 See paras 40–41.

23 Such transfers familiarly engage with the constructive trust law in common law jurisdictions.

24 See *JF v Hexagon Investments Ltd* [2014] 18 ITELR 470; see also *Webb v Webb* [1991] 1 WLR 1410.

presence or had voluntarily submitted to the foreign court's jurisdiction.[25] Proceedings for an *in rem* judgment are, of course, more exceptional. An *in rem* judgment given in respect of a ship is recognised if the ship was in the situs of the rendering court at the time of the commencement of proceedings.[26] Another uncontroversial instance is where the transfer of property is to be effectuated by implementation of a court's order for sale. While the declaration of a trust is a judgment of rights, an order that the property be sold and the proceeds handed over to the beneficial owner is merely a carrying-out of the judgment that the plaintiff has property rights to be realised by sale. This is an exercise of power to enforce the declaration of trust and a matter of jurisdiction. No one will suggest that the realisation of value needs to be evaluated and approved by a choice of law process or a recognitional analysis.

10 The coercive Chinn Assignment in *ROP v Maler Foundation* did not fit easily into any such familiar instance. It was clearly not a private voluntary assignment. Nor was it anything like an order for specific performance or an order declaring a resulting or constructive trust. Such orders are specific remedies which put third parties on notice and are of themselves by virtue of the doctrine of notice effectual without necessary judicial intervention at the time of notice. The Chinn Assignment, however, was a coercive remedy enforceable in turn against third parties by another coercive remedy of contempt by interference with the administration of justice. As a public law transfer, the Chinn Assignment was not an appointment of a receiver, by way of equitable execution, to sue for a chose in action due to the defendant Marcos Estate.[27] The Chinn assignee was only superficially like a receiver to collect a debt owing to the HRVs.[28] A receiver, aside from giving notice to the debtor for purposes of debt collection, has no personal interest whatsoever in the debt and may need to seek further orders to complete his duties under the receivership. Unlike a receiver, the Chinn assignee had an interest and was seemingly entitled to direct the nominee legal owners as beneficial owner. Neither was the Chinn Assignment a charging order nor any other execution of a judgment of property rights.[29] It might have had the appearance of a kind of proleptic execution of the *in personam* judgment for damages obtained by the HRVs, but it was certainly not a realisation of value. All the above-mentioned differences had a simple cause or explanation. The

25 See *Adams v Cape Industries plc* [1990] Ch 433.
26 See *Schibsby v Westenholz* (1870) LR 6 QB 155.
27 See *Macaulay v Guaranty Trust Co of New York* (1927) 44 TLR 99; see also *Re Kooperman* [1928] B & CR 49.
28 This is aside from the fact that the appointment of a receiver to collect a bank debt is seldom necessary since a *Mareva* injunction would practically be as effective and sufficient to freeze the debt pending issue of a writ of execution of judgment.
29 As in *Re Maudslay, Sons & Field* [1900] 1 Ch 602.

Chinn Assignment was a contempt order, a sanction imposed in the court's discretion for contempt of court.

11 What was unclear was whether that sanction was imposed following a commitment for contempt or pursuant to sequestration proceedings rather than committal proceedings. A sequestration for contempt of court is a distinct sanction which may be deployed against contemnors. It understandably is most effective against overseas contemnors whose persons but not their property are out of reach. It may be one of two kinds, differing in terms of value. If the plaintiff seeks the recovery of specific personal property, sequestration may be had against the property. At the option of the plaintiff, it may alternatively be had against the defendant's estate for the value of the specific property and damages for its detention. On the other hand, if the plaintiff seeks to recover damages for a wrong, it must be had against the defendant's estate. So then, if the Chinn Assignment was a sequestration of property in the hands of the third-party nominee legal owners, it would be of the second kind. No difficulty would be posed by the fact that the nominee legal owners were owners of a chose in action and that a chose in action could not be seized.[30] A writ of sequestration can be issued against a chose in action, whether legal or equitable.[31] However, sequestration of a chose in action would need to be perfected by recourse to legal process to make it effectual;[32] meaning something more than giving mere notice to the obligor which does no more than inform the obligor not to interfere with the writ of sequestration.[33] The writ of sequestration also would not operate as a charging order.[34]

12 However, there was no attempt to resort to a legal process to make the Chinn Assignment effectual, nor was there any reference to the Chinn Assignment being a charging order and nor did the assignment purport to operate on the nominee legal owners so that another vital element of sequestration was absent. Further, no one mentioned sequestration in the Singapore proceedings. There was some reference in the Court of Appeal judgment to likening the Chinn

30 Sequestration is in effect a seizure of property and does no more than authorise the seizure or taking into possession. It was, of course, impossible that the Chinn Assignment was a sequestration of legal ownership by seizure of the property.

31 This is although courts nowadays impose this sanction with considerable reserve and pretty much as a last resort.

32 An example would be an injunction to restrain the defendant from receiving the fund or a receiving order.

33 It also does not alter the fact that the obligor remains bound to pay to the defendant estate and no one else.

34 See *Re Hoare, ex parte Nelson* (1880) 14 Ch D 41. Indeed, even in the case of tangible property, the sequestrator must complete the taking into possession of property from the defendant. Giving notice of the writ of sequestration does not result in a charge on the property unless there is an attornment to the sequestrator.

Assignment to a garnishee order. Suffice it to say that garnishment bears a resemblance to the Chinn Assignment, but with important differences. The garnishee order must be served on the third-party debtor before it is effectual against the judgment debtor. Service on the third-party debtor creates a charge in the debt binding on the judgment debtor but until complete execution the third-party debtor is entitled to withhold actual payment if there are competing claims to the debt.[35] There would have been some resemblance to garnishment if the Chinn Assignment was a charge on the property upon notice being given. But the Chinn Assignment purported to deprive the judgment debtor immediately and irrevocably of his equitable interest and to bind the nominee legal owners without any further step having to be taken such as the giving of notice to them.

13 Beyond observing that the Chinn Assignment was neither a sequestration nor a garnishment, one can only speculate what its true nature was. There was no clarity as to this because no evidence of the foreign *lex fori* was adduced. It purported to be and was understood in the Court of Appeal to be an involuntary beneficial transfer. On such facts as were mentioned in the judgment, the correct answer was anybody's guess. Examination of the terms of the Chinn Assignment shows that the sanctioning court considered the relationship between the nominee legal owners and the defendant estate in relation to the Swiss deposits as a question of fact. Considered as a matter of applicable law, the question would be whether the nominee legal owners were so constituted that the defendant would have a founder's rights to direct how the deposits should be dealt with as well as decide the composition of the nominee legal owners or whether they were solely in control of the deposits and bound only to follow the prior instructions of the defendant founder. The order cryptically found as a fact (and possibly not as a matter of applicable law) that the founders, the ex-President Marcos and his wife, had dealt with the funds as representatives and were able to direct the Swiss Banks in which the deposits had been made. Having regard further to cases such as *Federal Trade Commission v Affordable Media LLC*,[36] the Chinn Assignment most likely served merely to empower the assignee to take steps to obtain and repatriate the deposits to the US.

14 This means that the Chinn Assignment was probably not so much a beneficial transfer but an order to do an act bearing some resemblance to the orders made in *Tasarruf Mevduati Sigerta Fonu v Merrill Lynch and Trust Co (Cayman) Ltd* [37] requiring the defendant to

35 *Société Eram Shipping Co Ltd v Cie International de Navigation* [2004] 1 AC 260.
36 179 F 3d 1228 (9th Cir, 1999). See also *Re Lawrence* 279 F 3d 1294 (11th Cir, 2002).
37 [2012] 1 WLR 1721.

delegate his powers of revocation to a receiver by way of equitable execution. In the same genre are orders by way of equitable execution against trustees who are subject or amenable to the court's jurisdiction to transfer the trust property to a new trustee.[38] It will not be material in such cases that the property is outside the jurisdiction if it is movable property.[39] Alternatively, such orders may be made if the property is situated within the jurisdiction of the court notwithstanding the trustee is not amenable to the jurisdiction as of right. In the case of the Chinn Assignment, what was different was that the order was not made by way of equitable execution of a prior judgment (and hence in order to realise the value of the judgment) but by way of sanction (additional relief) for contempt of court. However, like the order there, the Chinn order would not effect an immediate beneficial transfer at the time of its execution, thus minimising the impact of choice of law. Beneficial interests would only arise upon the assignee taking steps to repatriate the assets in question. Only then would choice of law be relevant.

15 These are important points of contrast. If the Chinn Assignment was substantially an "equitable attachment" of beneficial ownership, as was apparently predicated in the Court of Appeal judgment, the question of affirming or rejecting the beneficial interest of the HRVs would not simply be a matter of choice of law. Before reliance could be placed on the effect of the assignment as an effective proprietary transaction, it must be shown that equitable dispositions are effectual in a self-standing manner to establish rights. As a general rule, however, equitable interests do not give rise to an independent conflicts characterisation and are not independently recognised in the conflict of laws.[40] So, there would be a real question whether the assignment could only be effectual against third parties with the assistance of or through the intervention of the court, whether the foreign or the domestic court.

B. As public act of enforcement of law

16 To add to the complexity of the problem, even before the question of conflictual process could be considered, the effect of the creation or establishment of such an interest by the foreign court had to be accounted for as an exercise of foreign public authority or "act of state". Several reasons may be given for including an account of the public provenance of a foreign contempt order. First, there is an important difference between *in personam* orders in equity and

38 See *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139.

39 See *Ewing v Ewing* (1883) 9 App Cas 34, 40; 10 App Cas 453; *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; *Black Point Syndicate Ltd v Eastern Concessions Ltd* (1899) 79 LT 658; *Re Clinton* (1903) 88 LT 17.

40 See *Rickshaw Investments Ltd v Nicolai Baron von Uexhall* [2007] 1 SLR(R) 377.

in personam orders which sanction a contempt of court or contempt orders. The usual *in personam* orders in equity which affect beneficial rights, such as declarations of pre-existing rights under a trust, are made in the unlimited *in personam* jurisdiction of the court. They uncontroversially involve the adjudicative authority of the court where concerns of extraterritoriality are muted and mitigated. The latter *in personam* orders are also made by the court but the fact that the source of the order is the Judiciary is not what is significant. In appraising extraterritorial effects of "acts of state", international jurisdiction is not to be classified by reference to whether the organ of state charged with responsibility for the act is the Legislature, Executive or Judiciary. Applying public international law notions, the courts differentiate instead according to the substance and quality of the power or authority exercisable or exercised, not the source or attribution of responsibility in respect of exercise of the power. This results in a different classification between prescriptive, adjudicative and enforcement jurisdiction,[41] a more useful classification which avoids the false impression that an organ of state only and invariably exercises an eponymous authority referenced by its constitutional division and hierarchy of government under a doctrine of separation of powers.[42]

17 For the purposes of this article, the primacy of the public international law classification does not need to be questioned. The authority to prescribe is the power to regulate personal conduct whether by law, decree or executive order. The authority to adjudicate is the power to subject persons or things to judicial process for the sake of ultimate determination and disposition of rights, liabilities, interests and burdens. The authority to enforce is the power to compel obedience and compliance to law, decree or order. A simple penal illustration reveals this differentiation in a helpful manner for the purposes of understanding the sanction for contempt of court. Criminal laws are obviously enforced according to a judicial process which must comply with due process and calls for an act pronouncing a judgment of guilt and imposing a sentence. Notwithstanding that the organ of state which pronounces criminal judgment is the Judiciary, the substance of the power which the Judiciary exercises is the prescriptive jurisdiction in declaring criminal guilt and the enforcement jurisdiction in sentencing the convicted person for the offence. The criminal court, it may be explained, exercises a prescriptive jurisdiction and an enforcement jurisdiction because it never applies another country's penal law and never enforces another penal law but its own. Care, therefore, must be

41 See *Restatement of the Law: The Foreign Relations Law of the United States* (American Law Institute, 1986) at pp 230–233.

42 Thus, courts are also entrusted with "*jurisdiction gracieuse*" to make executive decisions in non-contentious matters such as giving consent on behalf of incapacitated adults or making child protection orders.

taken to avoid making indiscriminate reference to the criminal court performing a judicial act. A judgment upon committal for contempt is similar. It is not substantially a judicial act. The act of judging a contempt of court is rather an exercise of the enforcement jurisdiction to compel compliance with the court's coercive order. That being the case, it would be wrong to treat the Chinn Assignment as no different from an *in personam* order in equity, ignoring its enforcement dimensions.

18 Second, as an exercise of enforcement authority, the Chinn Assignment must come under additional scrutiny if its effects are sought to be replicated in another country.[43] There are several aspects to this scrutiny. Whenever an exercise of foreign enforcement authority is implicated in a private dispute before the domestic court, a question of non-justiciable act of state[44] may arise if the domestic court is or is likely to be asked to impugn its validity or legality.[45] In these circumstances, if the Chinn Assignment was an expression of non-justiciable policy of the foreign state, it should not produce any effect in the domestic forum as a matter of course. Any contested reliance on it would have to be dismissed if it would substantially involve non-justiciable issues.[46] To be more precise, it should be asked, what kind of non-justiciability is posited by a sanction for contempt of the foreign court? In *Shergill v Khaira*,[47] the Supreme Court of the UK divided non-justiciability into three classes. Only the first two defined by reference to subject matter non-justiciability are of relevance to the present discussion. The first comprises forbidden fields of debate defined by constitutional competence or separation of powers.[48] The court may not adjudicate "on

43 The Supreme Court of Canada in *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612 at [36] refers to the public law element of the contempt order.

44 See *Buttes Gas and Oil Co v Hammer (Nos 3)* [1982] AC 888 at 935–937. That case was rationalised as one calling for a political decision in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 1 at [40]. A judicial act is not an act of state; see also *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389; *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804.

45 The doctrine does not apply where the only issue is whether certain acts have occurred. See *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2014] QB 458; *Belhaj v Straw* [2014] EWCA 1394 at [54], agreeing with *Kirkpatrick & Co Inc v Environmental Tectonics Corp International* 493 US 400 (1990).

46 *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2014] QB 458 at [66]; *Belhaj v Straw* [2014] EWCA 1394.

47 [2014] UKSC 33; [2015] AC 359; *cf* the categorisation in *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453.

48 In *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453, the High Court dealt with a defence based on an alleged non-justiciable act of state. The plaintiff, having obtained leave to serve on the defendant in Hong Kong, served him personally by a process server. The defendant alleged that he should have been served in accordance with service provisions provided for under a treaty between

(*cont'd on the next page*)

the constitutional limits of the court's competence as against that of the executive in matters directly affecting the [domestic forum's] relations with foreign states … even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable".[49] The committal for contempt clearly falls outwith the first class. It has everything to do with the dignity of the court and encroaches neither upon the executive nor legislative functions in foreign relations.

19 The second comprises "claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law".[50] The doctrine of act of state comes in here.[51] It is submitted that the Chinn Assignment raises issues of non-reviewable matters of public law or act of state within this second class. For good or ill, the courts regard contempt of court through violation of court orders with peculiar attention. It cannot be assumed that the contemnor will have the same as of right recourse to appeal or challenge as an ordinary party to civil proceedings has. The older rule in common law jurisdictions was that the contemnor must obey before he could challenge the validity of the order he has disobeyed.[52] This could be the rule in the foreign court which has made a contempt order. If so, the contemnor must purge his contempt before there can be any consideration as to whether the order has exceeded the limits of the jurisdiction or is otherwise wrongful or improper. A number of reasons may be suggested for the principle that orders should be obeyed before they can be challenged.[53] A number of narrowly circumscribed

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Singapore and the People's Republic of China. The High Court held that the merits of the defence were justiciable as what appeared to be a question of international law (whether the HKSAR was "bound" by the Treaty) was a question which bore on application of domestic law.

49 *Shergill v Khaira* [2014] UKSC 33; [2015] AC 1 at [42], where the UK Supreme Court added the following observation:

> The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al Fayed* [2000] 2 All ER 224; [2001] 1 AC 395.

50 *Shergill v Khaira* [2014] UKSC 33; [2015] AC 1 at [43].

51 This is evident from the authorities referred to in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 1 at [43], where the UKSC observed, "save in cases where they are beyond the constitutional competence of the courts, issues of international law must be resolved where they engage a private right of the claimant or a reviewable question of public law."

52 See *Hadkinson v Hadkinson* [1952] P 285 at 288.

53 The first strand has in recent times been relaxed and courts now accept that the court should exercise a discretion to entertain a discharge or appeal in the interests of justice. The second strand is that the matters out of which the order was made which has been disobeyed are not to be open to collateral attack. A defendant

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exceptions to the rule have evolved which further illustrate and affirm these reasons. Without entering into the details, it can be said that whatever else is protected, the rule certainly protects third parties' expectations that the order will be followed. This means, ultimately, that the dignity of the foreign court has to be protected. It must be upheld if third-party expectations are to be protected. Third-party prejudice must also be averted. Third parties who act contrary to the order may be liable for criminal contempt in interfering with the administration of justice. Thus, a simple uncompromising rule that obedience comes before challenge is protective of third parties who have to decide whether to refrain from participating in a contemnor's disobedience of the order. It gives them an unequivocal answer. From the perspective of the domestic forum, the domestic court obviously should not attempt to consider whether the dignity of the foreign court is really at stake and, if so, whether the sanction meted out is commensurate with the perceived threat or injury to its dignity.[54] The position is not very different where the foreign court, more flexibly, exercises a discretion whether to insist on purging of the contempt before agreeing to entertain a challenge to the committal application. In many common law countries, that exercise of discretion will now be based on balancing the considerations but again, the decision will inevitably turn on judicial estimations of what the dignity of the foreign court requires. Hence, the validity or invalidity of the Chinn Assignment should in the abstract be non-justiciable if the nature of the claim, relief or defence was such that the domestic court would have to pronounce on non-justiciable policy (pertaining to the dignity of the foreign court).[55] When the HRVs sought to bind the Swiss Banks by the Chinn Assignment, they found no willing ear.[56] The US Court of Appeals rejected their application for a declaration on the ground that the Swiss freezing orders were an act of state which was non-justiciable. Contempt orders by the same token would also be acts of state, at least under American law, and on principle.[57]

charged with breach of an order of the court in contempt proceedings may not defend those proceedings on the basis that the order should not have been made in the first place. See *Isaacs v Robertson* [1985] AC 97. It matters not whether the order is merely voidable as opposed to being void.

54 This is not because it is a judicial act. A judicial act is justiciable (*The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389; *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804) and if it is, nevertheless, not reviewable it is because of finality.

55 It follows that any general reliance on the Chinn Assignment should be dismissed since it would not be possible to examine its invalidity for the sake of justice to the opposite party.

56 See para 6.

57 *Cf Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612, where the Supreme Court of Canada assumed the foreign contempt order was justiciable because it conceived of it as a judicial act.

20 The second class of non-justiciability is importantly subject to a significant qualification. "Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable."[58] It is submitted that one such issue is whether the Chinn Assignment was made by the court having international jurisdiction. Below, it will be considered in detail what "international jurisdiction" means generally and in the case of a contempt order or sanction. Suffice it for now to say that an *in personam* coercive order made by the foreign court will in not a few cases purport to exert a legal effect on third parties in the foreign state. It must be necessary to decide the issue of its international jurisdiction in order to decide if a private law liability has arisen in respect of notice of the contents of the order. To elaborate, let it be assumed that the Chinn Assignment purported to give the ultimate beneficial interest in the contested deposits to the HRVs. While the jurisdiction of the court making the coercive order is non-justiciable, it must nevertheless be resolved if there is any reliance on the assignment by way of assertion that these interests are enforceable against the nominee legal owners. That is itself a justiciable matter of private law liability and accordingly, if there is to be reliance on the assignment, the HRVs must ultimately overcome any objections based on lack of international jurisdiction.

C. As penal act or confiscatory act

21 A further complication arising out of the Chinn Assignment as an exercise of foreign public authority should be mentioned despite the silence in *ROP v Maler Foundation*. The deprivative character of the Chinn Assignment raised the possibility of its being caught by public law exclusionary rules. If, in substance, reliance on the assignment was tantamount to direct or indirect enforcement of a penal law or revenue law or other public law, the court would dismiss the claim.[59] More controversially, if (in substance) it was confiscatory, the court would dismiss the claim if the court was being asked to enforce it extraterritorially.[60] A case fairly in point is *Schemmer v Property*

58 *Shergill v Khaira* [2014] UKSC 33; [2015] AC 1 at [43].

59 See Tan Yock Lin, "Enforcement/Recognition of Foreign Confiscatory Laws in Singapore" [2015] Sing JLS 162.

60 If, in substance, there is a confiscation by a foreign confiscatory law of pre-existing rights, "another principle will apply, namely that the courts will pay no regard to such laws". See Romer LJ's remarks *arguendo* in *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] 1 Ch 19 at 22. In *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389, the Court of Appeal thought that the question of expropriation was a choice of law question to be decided by reference to the *lex situs*. Tan Yock Lin, "Enforcement/Recognition of Foreign

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Resources Ltd,[61] where a receiver appointed by the New York court applied in England to be appointed as ancillary receiver with powers of an English receiver. Goulding J examined the foreign law under which the appointment was made and found that the appointment had pre-emptive objects. It was pre-emptively designed to empower the receiver to take action to recover frozen assets belonging to persons alleged to have engaged in fraudulent activity in the US as well as to seek injunctive relief to stop further fraudulent activity by them. A notable fact was that victims of the defendants' fraud had yet to bring compensatory proceedings against the defendants. So, it was likely that the purpose of the receivership was also that when such proceedings for compensation were eventually commenced, there would be assets previously recovered by the receiver available to compensate the victims of the fraud. But there was no necessary entailment that recovered assets should thereby be set aside exclusively or substantially for the purposes of victim compensation. Taking these features of the order into account, Goulding J concluded that the order was substantially penal and that the court could and would not enforce a foreign penal law.

22 The authority of *Schemmer v Property Resources Ltd* has been narrowed but not overruled. Its foundation is in international law, said the English Court of Appeal in *Derby v Weldon (No 6)*.[62] In *European Bank Ltd v Robb Evans of Robb Evans Associates*,[63] the Australian High Court distinguished the English case as one where the receiver had no mandate to bring compensatory proceedings. This contrasted sharply with the fact that his counterpart in the Australian case had such a mandate. Consequently, it was held that the receiver in the Australian case was not seeking to enforce foreign governmental interests. (This exclusionary rule is regarded as embracing the previously established penal law rule.) Since these cases were decided, the trend to narrow the penal law rule has been unmistakable.[64] There is a case which seems to buck the trend. The decision of the majority of the Canadian Supreme Court in *Pro Swing Inc v Elta Golf Inc*[65] shows that a contempt order has a quasi-criminal nature and that enforcement of it will violate the penal rule. This conclusion, it is submitted, should not be understood broadly. It tracked very closely the particular contempt order which was made in that case. That order went clearly beyond serving the purpose of coercing performance. Its terms plainly exceeded the legitimate protection to which the holders of the US trademark were entitled. To

Confiscatory Laws in Singapore" [2015] Sing JLS 162 argues that the confiscatory rule is not a choice of law rule.

61 [1975] 1 Ch 273.

62 [1990] 1 WLR 1139.

63 [2010] 240 CLR 432.

64 See *US Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172.

65 [2006] 2 SCR 612.

ignore these details in the Canadian case, and to regard all contempt orders as barred from enforcement by the penal rule would be inconsistent with the modern narrowing trend seen in the English and Australian cases. Further, the majority judgment in the Canadian case was overly influenced by the presence of elements of the criminal process in Canadian committal proceedings and was based on the rejection of the distinction between civil and criminal contempt in Canadian law. Some doubts are possible that the Canadian law of contempt is more nuanced than as perceived.[66] It should in any case be added that the fact that the domestic law does not distinguish between coercive and punitive contempt is in any event neither here nor there. Even if the *lex fori* rejects the distinction for its own purposes, it will be more appropriate for the domestic court to adopt an enlightened *lex fori* characterisation for conflicts purposes when dealing with foreign contempt laws which adhere to the distinction.

23 In the case of the Chinn Assignment, then, whether the objection based on enforcement of a penal law could be raised would depend on whether it substantially involved a punishment or coercive compliance of the order of which the defendant was in contempt. Assuming the assignment was imposed in committal proceedings, careful scrutiny of the committal proceedings would be necessary to determine whether the former or the latter is true. There is no shortcut. There must not be blunt capitulation to the foreign law (for example, where the US law is the foreign law to the rule that under US law, the contempt order is regarded as a civil remedy). On the one hand, one must note that a sequestration is not of itself an expropriation, let alone confiscation, since it does not transfer title.[67] On the other hand, the fact that civil proceedings are prescribed for committal for contempt is not to be equated with coercive (and non-penal) enforcement. Nor are criminal proceedings for committal to be equated with punishment. The distinction between civil and criminal contempt is not coterminous with the distinction between coercive enforcement and punishment for contempt of court.[68] It should not also be overlooked that an award of a sanction or remedy for contempt may contain elements of coercion and

66 See MacLachlin CJ's dissenting judgment in *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612 at [106].

67 See *Benim v Whimster* [1976] 1 QB 297.

68 *Cf Gompers v Bucks Stove & Range Co* 221 US 418 (1911) at 441. In *Scott v Scott* [1913] AC 417, the House of Lords clearly regarded the distinction between civil and criminal contempt as process-influenced. Counsel's submission that every disobedience of a civil order must be a criminal contempt was rejected. These procedural differences have disappeared although the criminal standard of proof remains applicable whether civil or criminal attempt is in view.

punishment.[69] Where this is the case, the task will be complicated by the need to separate or sever the coercive enforcement from the punishment.[70] All this is enough to show how little vital information there was about the Chinn Assignment before the Court of Appeal. The court would have faced serious difficulties if a decision had to be made on the applicability of the penal law exclusionary rule. Fortunately, the claimant could be given the benefit of any doubt. On such facts as were uncontested, it was highly unlikely that the Chinn Assignment was imposed in committal proceedings and highly likely that the HRVs had pursued a writ of attachment rather than committal for contempt. Further, the assignment of the beneficial interest, if this was what the order was intended to achieve, was unlikely to contain any penal excess appropriating more than was due to the HRVs as damages for violation of their human rights and was probably subject to prior equities binding on the nominee legal owners. In short, the transfer was in all probability a coercive enforcement of the worldwide freezing orders which had been violated by the defendant estate.

24 The possible impact of the confiscatory rule can swiftly be disposed of. While contractual rights are not capable of being confiscated,[71] beneficial interests can apparently be confiscated. However, it is not likely that the confiscation rule will be engaged unless third-party rights are taken away, although in *Frankfurter v W L Exner Ltd*,[72] Romer J considered the laws in question (seemingly, laws of sale and management by appointment of a trustee) to be confiscatory, and contemplated that the beneficial ownership of a company by confiscation of its assets could be the subject of confiscation.[73]

25 The foregoing description has sufficiently mentioned several complications posed by the Chinn Assignment. It has revealed that vital information was missing about the nature of the assignment before the Court of Appeal. The terms of the assignment were also lacking in complete clarity. One may surmise this from the terms of the order because the ex-president and his wife were simply ordered to execute an assignment of the bank accounts in the form attached to the order in favour of the plaintiffs' lead counsel (Robert Swift), who was to deposit the proceeds from the assignment with the court clerk. The conflict of laws has a technique for resolving incomplete cases such as this. If that

69 See *Allason v Random House (UK) Ltd (No 2)* [2002] All ER (D) 158. Although imprisonment as a sanction for civil contempt is thought to be still common.

70 See *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612 at [108], *per* MacLachlin CJ.

71 See *Royal Boskalis Westminster NV v Mountain* [1999] QB 674.

72 [1947] Ch 649.

73 See also *Novello & Co Ltd v Hinrichsen Edition Ltd* [1951] Ch 595; *cf Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 369; [1986] 1 All ER 129.

technique were available, then in the absence of evidence of the foreign law as to the nature of the Chinn Assignment, the problem could have been resolved simply in terms of the presumption of similarity of laws. On the facts, however, invoking the presumption would not have helped. The simple answer of presuming the assignment to be no more than a usual sequestration to be perfected by recourse to legal process would not have availed the HRVs. The HRVs' claim would have had to be dismissed all the same since they could not have asserted their interests directly, even where the nominee legal owners were participants in the proceedings, without joining the Chinn assignee as the sequestrator. The case for the direct claim of the HRVs would not be improved if the true position was that the domestic court would not provide the benefit of such presumption of similarity when reliance was to be placed on a disposition of interest under a coercive order. That order must be clear in its own terms or be capable of being made clear by recourse to the foreign *lex fori*.[74] As already said, the terms were not at all clear. Assuming, however, that the Chinn Assignment had immediate beneficial effect under and by way of a sub-trust, the case would be an example of enforcement of a contempt sanction which straddles or cuts across a number of boundaries. One boundary is that between authority and rights. There is exercise of sovereign authority but also a taking away of beneficial entitlement. Another boundary is that between finality of a prior exercise of authority and claims to a fresh exercise of authority by the domestic court. Finding a conflicts solution in these circumstances requires consideration of a third boundary. This is that between public ordering and private justice. These considerations pose a challenge for conflictual analysis and the discussion that follows considers the merits and demerits of three possible solutions.

IV. Recognitional analysis

26 If it is important to subject the authoritative provenance of a creation of rights to conflictual reasoning, how should this be done? Could and should an award of sanction for contempt of court be analysed as an order to be recognised and enforced by the forum court? The recognitional analysis is most developed for enforcement of foreign money judgments where its distinctive features fully appear.[75] In these proceedings, the plaintiff seeks a declaration that the judgment is enforceable for the purposes of availment of the facilities of the domestic forum for execution of judgment. To bring these proceedings, the plaintiff must establish *in personam* jurisdiction over the defendant for a

74 See *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612.

75 One must not be misled by the enforcement terminology to suppose that nothing like recognition is happening. Recognition is a highly contextual word and simply refers to the bringing of proceedings to enforce a foreign judgment.

declaration of enforceability, a requirement fictionalised as a suit on a cause of action in debt arising out of the judgment.[76] Such declaration is simply a recognition of enforceability, namely that the judgment which is *res judicata* under the foreign law is recognised as final and conclusive under the *lex fori* if given by a foreign court of international jurisdiction.[77] To put it shortly, the recognitional analysis accords finality and conclusiveness to the merits of a foreign judicial act subject only to an arguably semi-closed list of peripheral and exceptional requirements of manifest unfairness and impassable restrictions.[78] It is only then that the domestic court will withdraw its facilities for execution of judgment on grounds of manifestly flawed substantive merits of the judgment or fundamental procedural infidelity in the original court.

27 A similar approach and solution is to be found in the now no longer ground-breaking instances where the domestic court is asked to recognise and enforce a foreign non-money judgment vindicating intellectual property rights through injunctive relief such as a permanent injunction to compel the destruction of infringements of intellectual property[79] or an order of specific performance. This extended use of the recognitional analysis has been advocated in Canada and justified as being an incremental change resting on principles of comity. One must especially note the shifting conception of comity which serves as prime mover for this development. In the turning point case of *Morguard Investments Ltd v De Savoye*,[80] which introduced the shift in interprovincial recognitional disputes, the Supreme Court of Canada said: "the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner".[81] Then, in *Beals v Saldanha*,[82] the court insisted that the imperative need to advance "[t]he principles of order and fairness [ensuring] security of transactions, which necessarily underlie the modern concept of private international law",[83] is not any less urgent in international cases. International comity, accordingly, means not so much respect in a self-restraint sense of not

76 See *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129.

77 See *Godard v Gray* (1870) LR 6 QB 139; *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129.

78 See *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515; *Belleza Club Japan Co Ltd v Matsumura Akihiko* [2010] 2 SLR 342.

79 This also applies to where the forum court recognises an executive act or act of a foreign public officer by way of certification or deed for evidentiary purposes, affording it the conclusiveness of regularity if the requirements prescribed for authentication are met.

80 [1990] 3 SCR 1077.

81 *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1096. At 1098, the Supreme Court of Canada urged that the task had become imperative.

82 [2003] 3 SCR 416.

83 *Beals v Saldanha* [2003] 3 SCR 416 at [27].

encroaching upon or sitting in judgment of another court but a more forward attitude of advancing the international order in a constitutive sense. Another landmark but closely divided Supreme Court of Canada decision, *Pro Swing Inc v Elta Golf Inc*, found that the answer was once again in this notion of comity when the question arose whether the domestic court could recognise and enforce non-money judgments – in that case, a consent order and a contempt order. However, the extension, even to consent orders, will be narrowly circumscribed. Aside from the rendering court being of competent jurisdiction, the order must be of such a nature that the principle of comity requires the domestic court to enforce it. The assistance cannot exceed in kind and extent what can be provided to local litigants. Further, the domestic court is entitled to refuse assistance on discretionary grounds when the integrity of the domestic justice system must take pride of place.

28 In practice, the conditions that the foreign order must be final and clear and that the domestic court may exercise its discretion to refuse assistance will often prove to be key elements of this extended recognitional analysis. The first means that there is a preclusion against interlocutory orders. With respect to final or permanent orders, there should seldom be serious difficulties in the domestic court accepting a final determination on the merits for the purposes of estoppel and precluding a fresh suit between the same parties or their privies. Enforcement which goes beyond this while countenanced under the new bolder conception of comity will be qualified where it was a breach of comity in the first place for the order to be made. So, it is a limited recognition of relief in respect of such pre-existing rights as are embodied or vindicated by the order. Such relief may involve access to the domestic legal process on the basis of those pre-existing rights in the domestic court's discretion. Suppose, for instance, an *in personam* judgment declaring a resulting trust against the defendant and a subsequent dealing by the defendant of the property in the domestic forum with a person judged by the domestic *lex fori* to be a non-*bona fide* purchaser for value without notice of the judgment "creditor's" interest. The domestic court granting recognition of the resulting trust interest may make the doctrine of notice available to the judgment holder and provide him relief according to the doctrine.

29 Two other areas which are susceptible and have been subjected to limited recognitional analysis may be mentioned in briefer outline. Both involve recognition of state grants of legal representation of private persons by private office-holders, in the one case of a trustee in bankruptcy and in the other of a personal representative to administer a deceased's estate. In both cases, there are collective proceedings for the enforcement of rights, discharge of liabilities and distribution of assets. The court appoints the trustee in bankruptcy or administrator to take charge and be responsible for matters respectively entrusted to them as

officers of the court.[84] It goes without saying that the appointing court remains in oversight control of their discharge of duty. Where such office-holder has been appointed pursuant to pertinent proceedings in another competent jurisdiction, it is a question of recognitional analysis whether the domestic court will recognise that he has the representative capacity conferred originally. In order to achieve or approach the ideal of universality of bankruptcy and, thus, more effectively preserve the value of the bankrupt's assets from forced deflation, the domestic court will not open to re-examination the merits of the foreign grant. Recognising the office and the capacity attached to it, the domestic court simply regards the office-holder as vested with title to all the bankrupt's property; and thereby as having access to the domestic court by virtue of that title to property. No recognition of the rights to be enforced occurs since the trustee in bankruptcy seeking to enforce pre-existing rights vested in him is subject to prior rights and equities. Also, no attribution to the foreign trustee in bankruptcy of the powers and duties conferred or incumbent on the local trustee in bankruptcy is made. Where the foreign representative is a personal administrator, an even more circumscribed recognitional analysis is to be found. Under the *lex fori* principle of mandatory administration, the foreign grant of representation is recognised only for the purposes of the foreign administrator applying to the domestic court for authority to get in the net balance of assets under the domestic administration from the personal representative appointed by the domestic court.[85] The foreign representative may, of course, apply to be appointed by the domestic court as local representative but unless he does and is so appointed (and there may be reciprocating arrangements to facilitate this) no title to the deceased's estate will vest in him and he simply has no standing to sue as administrator in the domestic court. Why this should be so is not much in doubt. It is for the sake of protection of the beneficiaries of the deceased's estate that the domestic court must insist on personal approval and control of the appointee. To that end, the court will ensure that mandatory administration is kept distinct from matters of succession.

30 Significantly, it does not follow that the recognitional analysis will be appropriate whenever a legal personality or status is created under state authority. The case of the foreign company and foreign marriage may be contrasted with the foreign office-holder. In both instances, recognitional analysis is eschewed. The fact that there is or may be an administrative process of registration, incorporation or

84 See *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Sweet & Maxwell, 2012) rr 142, 143 and 179.

85 See *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Sweet & Maxwell, 2012) r 144; see also *New York Breweries Co Ltd v Attorney-General* [1899] AC 62.

solemnisation has no significance in this respect. The domestic court will, if necessary, examine the validity of the registration or marriage solemnisation by reference to applicable law. This may entail resorting to the applicable law since it is unlikely that validity will be presumed under a doctrine of territorial act of state.[86] The recognition of a trust under the Hague Convention on Choice of Court Agreements[87] ("the Convention") also does not detract from this observation.[88] There, recognition is employed in a special sense to accommodate the rejection of the trust by civilian law. Civilian law, apart from the Convention, will have difficulties conceiving the legitimacy of fragmenting a patrimony, which is what a trust does. Where the Convention is in force, member states are, therefore, enjoined to disapply such principles of patrimony that would otherwise invalidate the common law trust. They are to recognise as valid the common law trust but nothing else ensues from the recognition. The trust will still have to be tested for validity according to the governing law if an issue is raised to that effect. It is clearly unnecessary to be troubled by this specialised usage of the concept of recognition.

31 The general principles of recognition may be summarised as follows:

(a) Recognitional analysis does not assume a uniform character. Recognition can mean "recognise and enforce as if the order were domestic after a declaration of enforceability in domestic proceedings", "recognise and give effect or relief in the court's discretion on the basis that pre-existing rights are as declared", or "recognise as having authority or title to sue for pre-existing rights". In whatever sense it is employed, the common characteristic is a judicial act, or an act intimately connected with a judicial act, or a judicial appointment of an officer with delegated judicial authority to act upon pre-existing rights and discharge pre-existing liabilities.

(b) Recognitional analysis, in the first sense, is the strongest. It is indifferent to concerns about substantive merits and irregularities in foreign procedural law. It is intended to obviate a repeat of choice of law analysis in the domestic court and produce finality of judicial acts. The analysis is, thus, apt when a judicial investigation has been conducted and conclusions reached by application of law to the facts in the

86 See *Lucasfilm v Ainsworth* [2012] 1 AC 208.

87 *Ie*, the Hague Convention of 30 June 2005 on Choice of Court Agreements.

88 See *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Sweet & Maxwell, 2012) comment to r 170.

foreign court as a final resolution of a contentious dispute *inter partes*.[89]

(c) Recognitional analysis, in the second sense, is to be found in Canadian case law on recognition of *in personam* non-money orders. Although such orders must be final orders of sufficient clarity, it is not purely for the sake of finality that assistance is afforded. There is a balance to be struck between comity and the integrity of the domestic justice system. Hence, there is a vital discretion in the courts to strike an appropriate balance, implying that substantive merits and procedural irregularities may be reinvestigated and assistance may be withheld where it would be inadvisable or unjust.

(d) Recognitional analysis, in the third sense, is to be found in the cases where the foreign court has appointed an office-holder who, being presumptively an officer of that court, acts under its presumptive supervision. This analysis may be more or less circumscribed. The title of the office-holder may be recognised in the sense that he is excused from having to reapply to be appointed as a similar officer by the domestic court in order to be vested with title to property of represented person. On the other hand, the title may only be recognised for the purposes of transmission of net assets.

32 Some further general observations are possible. It is discernible that where relations between states are only indirectly implicated as in the formation of a company[90] or marriage, choice of law solutions are perfectly adequate. A domestic court would prefer to adjudicate any relevant dispute than be bound by a prior adjudication under a recognitional analysis. This makes sense since considerations of relations between states are of secondary importance. Irrespective of how the relations and status between the parties may have been created, the ongoing effects and impact on the community where the putative parties to a marriage live or the putative company conducts business are what are important. On the other hand, it does not follow that whenever relations between states are involved in the private dispute or relationship, a recognitional analysis must be followed. The above-mentioned principles indicate that even where relations between states are directly implicated, considerations of state authority are, nevertheless, to be subordinated to compelling interests in finality or

89 Upon proof of the foreign judgment, a domestic order is made to approximate to the foreign order. The same observation is true of *in rem* judgments declaring property rights in property which is situated in the forum of the original court which is seized of proceedings in which rights in the property are the object.

90 It is possible that this is not regarded as true of the formation of a company since a company is a creature of the state prerogative to trade.

uniformity between parties in dispute. A reasonable conclusion to draw is that a recognitional analysis is not suitable to grant conclusiveness, judicial assistance or delegated authority, when there is no prior: (a) determination reached after a proper adjudication as to property rights; or (b) judicial appointment and grant of delegated authority to a suitable and qualified person to get in assets for the purposes of distribution according to right and equity.

33 If these conclusions are reasonable, an order which does not substantially determine pre-existing rights or preserve pre-existing property rights but trumps them ought not to be given conclusive effect through a recognitional analysis. In the dispute in *ROP v Maler Foundation* between the HRVs and the defendant estate out of which the contempt sanction arose, there was a determination of personal rights in favour of the HRVs for the defendant's violations of tort law. The determination, however, had nothing to do with property rights in the Swiss deposits. Plainly, the Chinn Assignment was not a judicial act. It had nothing to do with the merits of the tort litigation. Nor was it anything like a representation order for distribution of property according to applicable law after a determination of rights in the property. It was a coercive order.

34 Could an argument, nevertheless, be made for applying a recognitional analysis to permanent coercive orders? It was mentioned earlier that invoking principles of comity, Canadian courts have been prepared to give effect to foreign permanent injunctions. To be sure, this reimagined comity is system-oriented, emphasising the forum state's interest in a well-ordered and smoothly functioning international dispute resolution system that will be fair because it promotes legitimate expectations in dispute resolution. In actuality, the judgments in *Pro Swing Inc v Elta Golf Inc* support a recognitional analysis for contempt orders at least if they are not excluded by the penal law rule. The majority judgment acknowledged that recognition and enforcement of coercive orders raised concerns of territorial scope. In particular, Canadian residents should not be subjected to unforeseen obligations from a foreign court. While this did not go to jurisdiction, it indicated that recognition and enforcement should be subject to new conditions or defences fashioned particularly to obviate prejudice and unfairness arising from extraterritorial enforcement.[91] The minority judgment also supported recognition of contempt orders. MacLachlin CJ, delivering that judgment, was not troubled by the potential extraterritoriality of the contempt order, saying that the order was clearly enforceable in Canada. It was immaterial that the order could extend to other countries than the forum of the domestic court and the original forum. Under the

91 *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612 at [25].

reimagined principles of comity, extraterritoriality concerns are already and adequately accommodated by requiring that the order must be one that is made by a court with a reasonable and sufficient connection to the dispute and the parties.

35 In the present view, where the contempt order is, in substance, a reiteration of the compromise reached by the parties and embodied in the consent order, as in *Pro Swing Inc v Elta Golf Inc*, what other conclusion can there be other than that both (or neither) orders should be recognised? For the sake of finality, unless the contempt order is recognised and enforced, the substantive merits will be relitigated collaterally through the contempt order. However, where the contempt order does not engage with substantive merits which have been resolved to a final conclusion, all the reasons for a recognitional analysis disappear. A coercive order which assigns the beneficial interest in a bank deposit carries necessarily the right to delivery up from the third-party legal owner and the right to enjoin the bank from assisting in a breach of trust when the third party gives a contrary mandate to the bank. It is one thing to accord finality to a permanent injunction based on an adjudication of pre-existing rights which gives effect to a judgment of rights. It is quite another thing to accord finality to a permanent contempt order which is not a judgment of rights and, in substance, can or is to operate (if at all) only on a third party. If the Supreme Court of Canada's decision in *Pro Swing Inc v Elta Golf Inc* had been intended to be so far-reaching, it would cease to be the incremental decision which it was proclaimed to be. The majority, it will be recalled, specifically considered the principle of judicial economy as being relevant in deciding whether assistance by the domestic court should be furnished. That principle is against assisting permanent orders that are divorced from the substantive merits and are largely process-related. Where the contempt order is process-related, concerns of extraterritoriality and non-justiciability should not and cannot be ignored,[92] as the immediately succeeding discussion will demonstrate. A recognitional analysis according finality to the merits would completely marginalise concerns that the foreign court may have made an order with respect to non-justiciable matters of the integrity of the foreign judicial process. It would furthermore not make business sense to clothe the process-related contempt order with finality for the sake essentially of affirming and protecting the integrity of the foreign judicial process. This could come at too great a price, as the final discussion on choice of law will show.[93]

92 These concerns are elaborated in the succeeding discussion of jurisdictional analysis. See paras 36–57.

93 See paras 58–70.

V. Jurisdictional analysis

A. Structural framework

36 The second possibility is to pursue a jurisdictional solution. A jurisdictional analysis is certainly appropriate where the predominant consideration is that relations between states are directly implicated and likely to affect the ends of justice if potential conflicts between them are not moderated at the outset by an appropriate allocation of authority, whether adjudicative, prescriptive or enforcement. Such is the case, for instance, if the domestic court is asked to exercise its coercive authority to appoint a receiver to get in the debtor's assets by way of execution of its own judgment. Will it also be appropriate if the domestic court is asked to compel a beneficial assignment as sanction for contempt of the court? And, will it also be appropriate if the domestic court is asked to give effect to a foreign court's sanction for contempt of that court? It is instructive to look generally at the way courts assume jurisdiction to make both proprietary and personal orders before turning to the contempt sanction. At least one or more of four core questions may have to be answered. First, is there domestic authority to make such order? Second, if the domestic authority is legislative, then as a matter of construction, will the presumption of territoriality be rebutted? Third, if the power is extraterritorial, will the principle of international law of reasonable or international jurisdiction be applicable? If so, will the doctrine of comity be applicable whether in addition to or in place of the principle of international law of reasonableness? Fourth, are the same jurisdictional principles applicable when the domestic court is presented with a foreign court order and asked to enforce it in some sense? For the purposes at hand, there is no need to discuss the first and second questions at length and it is presumed in due course that the principle of reasonableness of jurisdiction under public international law is no longer questionable.

B. Territorial non-justiciability

37 The answer to the first question depends on whether the source of the court's coercive jurisdiction is judicial or legislative, that is, inherent or statutory. If the source is judicial, there may be a subsidiary question of whether the domestic court although having jurisdiction should adjudicate an issue which may require it to make a non-money order which must be effective or enforced, if at all, in another state. The concern is not about adjudicating a non-justiciable act of state. There is seldom an obstacle when the domestic court is asked to adjudicate

domestic acts of state, many of which will be justiciable.[94] The concern is about territorial non-justiciability or the third kind of non-justiciability identified in *Shergill v Khaira*.[95] The case of *British South Africa Co v Companhia de Moçambique*[96] provides an illustration of how territorial non-justiciability can arise in property-related disputes. The rule directs that courts should not adjudicate issues of foreign title to immovable property. Attempts to extend the rule to intellectual property rights have clearly revealed that the true basis of territorial non-justiciability is comity.[97] For the sake of comity, the court is enjoined to refuse adjudication and make an *in personam* order "[if] the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party".[98] *A fortiori*, if there is evidence that the order is founded on an equity which is extinguished or rejected by the law of the locus of the claim.[99] It has also been said that an order that the defendant perform his contract or do equity "will not be made if the carrying out of it is illegal or impossible according to the *lex situs*".[100] Accordingly, under a jurisdictional analysis, although a court may have *in personam* jurisdiction to impose a contempt sanction on a party to proceedings of which it is seized, it must also consider whether imposing a sanction which will affect rights including those of third parties in immovable property will conflict with the comity that is due to an implicated foreign state.

94 See *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453.

95 [2014] 3 WLR 1; [2014] UKSC 33 at [41]: "[s]ome, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land … are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states".

96 [1893] AC 602, adopted in *Ng Teck Sim Colin v Hat Holdings Pte Ltd* [2010] 4 SLR(R) 840.

97 See *R Griggs Group Ltd v Evans* [2005] Ch 153, affirmed [2005] EWCA Civ 11 (CA); *Lucasfilm v Ainsworth* [2012] 1 AC 208. Attempts to apply the *Moçambique* rule to a foreign copyright failed in both cases. Earlier rationales for this rule suggested that non-justiciability of a local action was entailed by the absence of manageable decisional standards with respect to local sovereign conditions.

98 *Deschamps v Miller* [1908] 1 Ch 856 at 863. See also *Black Point Syndicate Ltd v Eastern Concessions Ltd* (1899) 79 LT 658.

99 See *R Griggs Group Ltd v Evans* [2005] Ch 153; [2005] EWCA Civ 11 (CA). See also Milllett LJ sitting as first instance judge in *Macmillan Inc v Bishopsgate Trust (No 3)* [1995] 1 WLR 978 at 989.

100 *Webb v Webb* [1991] 1 WLR 1410 at 1418.

C. Presumption of territoriality

38 On the second question, whether a statutory power to act is extraterritorial, the Court of Appeal decision in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd*[101] ("*Burgundy Global Exploration*") will not be missed. The court there distanced themselves from the result in the House of Lords case of *Masri v Consolidated Contractors International (UK) Ltd (No 4)*[102] albeit adopting the same principles of a presumption against extraterritoriality and of rebuttal.[103] The difference was in the exact outcome reached. Relying on the presumption against extraterritoriality, Lord Mance had held that Pt 71 of the UK Civil Procedure Rules 1998[104] ("CPR"), which corresponds to O 48 r 1 of the Singapore Rules of Court[105] ("RoC"), should be construed as not having extraterritorial effect. The presumption against extraterritoriality was not rebutted. There were no provisions there or elsewhere in the CPR authorising service of an order made against an officer under Pt 71 of the CPR. Moreover, as the means to serve out on an absent officer were unavailable, the judgment creditor should not be allowed to get the absent officer in by his backdoor application for a disclosure order under s 37 of the UK Senior Courts Act 1981.[106] The corresponding Singapore provisions, however, were different and the Singapore Court of Appeal held that the presumption was overcome. It was rebutted by the fact that the RoC contained provisions in O 11 r 8 for service on an absent officer. The court proceeded, therefore, to determine whether the court should exercise the discretion under O 11 r 8 to give leave to serve the examination of judgment debtor ("EJD") order on the absent director. Incidentally, in a case like *ROP v Maler Foundation*, this core question would be irrelevant. The contempt sanction which the Court of Appeal in that case had to address was clearly made in the unlimited *in personam* jurisdiction of the foreign court over the present defendant and, thus, operating within the four corners of the court's inherent jurisdiction to punish for contempt of court.

101 [2014] 3 SLR 381.
102 [2010] AC 90.
103 The Court of Appeal also thought that the public interest analysis used in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] AC 90 did not provide a sustainable basis for deciding which laws should be interpreted as having extraterritorial effect, and which not.
104 SI 1998 No 3132.
105 Cap 322, R 5, 2014 Rev Ed.
106 c 54.

D. Subject-matter jurisdiction

39 The third question is especially important when an order is to be made against a non-party who is neither a subject nor national of the forum of the domestic court. It is not controversial that the court has unlimited *in personam* jurisdiction to make orders to do or not to do an act against a party to proceedings before the court irrespective of its extraterritorial nature. This is abundantly clear from the *Mareva* (or freezing order) cases which strongly affirm that the extraterritorial situation of property to be frozen is not a bar to the *Mareva* jurisdiction.[107] The courts, however, are not unmindful that the order ought to be granted with such proper self-restraint as is due to international comity. Thus, without in any way diminishing the clear difference between *in rem* orders and *in personam* orders affecting property outside the forum, Lord Hoffmann in *Société Eram Shipping Co Ltd v Cie International de Navigation*[108] ("*Société Eram Shipping*"), comparing the third-party debt order and the freezing order, thought that even in the latter case, sensitivity to considerations of foreign sovereignty was essential and to be duly accorded. While a freezing order intended to apply to foreign banking debts will not put a bank in an invidious position of having to pay twice, it must be "carefully limited to avoid placing banks in situations of conflict between obeying an English order and dishonouring obligations under foreign law which does not see the English order as an excuse".[109] With regard to comity, courts in making such orders will impose a(n) *Babanaft* or other suitable proviso[110] so that third parties who could be affected by the *Mareva* order may, despite the order, conduct their affairs in accordance with the law of their place of business. Courts also recognise that cases of enforcement are practically relevant only when a non-party is sought to be bound and may for the same reasons subject the order to an undertaking that enforcement may not be pursued without leave of the court.[111]

40 Especially where the person to be ordered is not a party, the courts in an increasing number of instances have held they must have subject-matter jurisdiction according to the rule of international law known as the doctrine of international jurisdiction. The rule of international law that no country may seize property in another and as a

107 This is following the decision in *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65.

108 [2004] 1 AC 260.

109 *Société Eram Shipping Co Ltd v Cie International de Navigation* [2004] 1 AC 260 at [56].

110 See *Babanaft International Co SA v Bassatne* [1990] Ch 13, revised in *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65.

111 See *Dadourian Group Intl Ltd v Simms* [2006] 1 WLR 2499.

corollary that no court may purport to attach property in another except by its consent is already very familiar. Translated into jurisdictional terms, a domestic court does not have subject-matter jurisdiction to seize property in another state for purposes of enforcing compliance with the law. In *Société Eram Shipping*, the plaintiff who had obtained a successful English judgment, entitled to enforcement, asked the English court to make a third-party debt order against a bank in Hong Kong.[112] Lord Bingham held that it did not much matter where the third-party debt was situated; it was not open to the court to make an order in a case, such as the present, where it was clear or appeared that the making of the order would not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governed that debt. This was expressed as a requirement of comity (though in past cases, the same point came across as a matter of lack of equity in making the order). However, his Lordship preferred to say that it was not open to the court as a matter of want of subject-matter jurisdiction to make the order. Lord Hoffmann agreed. He acknowledged that recourse to comity reasoning in the authorities was one of fairness and equity between the parties. But there was another dimension. The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim; and it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries.

41 Comparing the judgments of Lords Browne-Wilkinson and Hoffmann, can it be said that there are seemingly two rationes, one resting on comity (that the proper law of the debt must recognise the order as full and perfect discharge of the third-party debt) and another on subject-matter jurisdiction? In a subsequent case, *Masri v Consolidated Contractors International (UK) Ltd (No 2)*,[113] the plaintiff asked the court to make a receivership order against the judgment debtors in respect of their assets sited outside the jurisdiction. The trial judge made the order and the English Court of Appeal agreed that he was right in this respect, holding that there was subject-matter jurisdiction to make the *in personam* order. First, the court rejected the submission that there were two rationes in *Société Eram Shipping*. There was only one ratio, namely, a court does not have subject-matter jurisdiction to seize or attach assets or create title in assets in a foreign state. Second, the court held that, unlike a third-party debt order,

112 The same House of Lords as constituted decided both this case and *Kuwait Oil Tanker Co SAK v Qabazard* [2003] 3 WLR 14. *Société Eram Shipping Co Ltd v Cie International de Navigation* [2004] 1 AC 260 contained more reasoning which *Kuwait Oil Tanker Co SAK v Qabazard* then confirmed and applied.

113 [2008] EWCA Civ 303; [2008] 1 CLC 657.

a receivership order operates *in personam* and the requirement of subject-matter jurisdiction will be satisfied if there is a sufficient connection with the English jurisdiction to justify the making of the order. The fact that the order in question in that case was to facilitate the enforcement of an English judgment or award provided the requisite connection; indeed, the court must have ancillary jurisdiction to perfect the enforcement of its own judgment.[114] Accordingly, it was held that the judge had not exceeded the permissible limits of international jurisdiction in making the order.

42 The Singapore case of *Burgundy Global Exploration* is an important addition and contribution on this point. Besides affirming the extraterritorial scope of the provisions relating to examination of a judgment debtor and persons associated with him, the Court of Appeal apparently considered that the requirement of subject-matter jurisdiction, which the court denominated the substantive jurisdiction, was a general requirement of jurisdiction to exercise an extraterritorial legislative coercive power. The court did not regard the House of Lords case as merely laying down principles peculiar to a garnishment or attachment of property. The court regarded "the question of subject-matter or substantive jurisdiction [as] concerned with giving effect to the presumption against extra-territoriality".[115] The effect of rebuttal of the presumption of territoriality is not an unlimited extraterritorial jurisdiction but a limited substantive jurisdiction or subject-matter jurisdiction. Also noteworthy, the Court of Appeal treated the requirements of personal jurisdiction and substantive jurisdiction as distinct, though related. A significant implication would appear to flow from this. This is that, in principle, it may be appropriate in some cases of unlimited *in personam* jurisdiction to require much more than that the order should be consistent with comity, namely, to require that there must also be substantive jurisdiction to make the order.

43 The point of this submission can first be illustrated by reference to the *Mareva* order. Traditionally, *Mareva* cases have involved the unlimited *in personam* jurisdiction over a party to the proceedings to order him not to deal with specified assets subject only to self-restraint in the court's discretion for the sake of international comity. In the words of Lord Donaldson of Lymington MR, which were spoken of a *Mareva* order, a party to an action in the forum "can properly be ordered to deal with its assets in accordance with the orders of the

114 *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303; [2008] 1 CLC 657 at [59]–[61].

115 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [81].

court, regardless of whether the order is recognised or enforced in Luxembourg. The only effect of non-recognition would be to remove one of the potential sanctions for disobedience".[116] However, in the case of a non-party, who is such typically because there are no substantive proceedings against him in the domestic forum, the House of Lords decision in *Fourie v Le Roux*[117] shows that the unlimited *in personam* jurisdiction over him obtained by personal service is not sufficient to justify a *Mareva* order in aid of foreign proceedings. There must also be subject-matter jurisdiction for this. This proposition arguably is capable of general application beyond the *Mareva* jurisdiction.

44 Second, the Court of Appeal in *Burgundy Global Exploration* drew a distinction between cases on service out of and service within the jurisdiction. Chao Hick Tin JA said: "[w]hether the court should exercise personal jurisdiction over the foreign officer is the issue, but in coming to a decision on this it seems inevitable that it should also have regard to whether this is merely the prelude to the impermissible exercise of exorbitant substantive jurisdiction."[118] What this indicates is that personal jurisdiction and substantive jurisdiction in "service out" cases are not coterminous. While the court will not assert personal jurisdiction by service out if there is no substantive jurisdiction to exercise the power in question, the court will hesitate to assert personal jurisdiction by service of the order out of the jurisdiction if there is only substantive jurisdiction. To make sense of the distinction on the facts of the case, it can be inferred that there was substantive jurisdiction since the court was seized of proceedings in which the evidence to be obtained from the non-resident person was relevant. However, the discretion to assert personal jurisdiction was exercised in favour of giving leave to serve out the EJD order because of the very close connection between the evidence, which was located outside the jurisdiction, the person and the forum of the court.[119]

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116 *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 at 82.

117 [2007] 1 WLR 320.

118 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [82].

119 In one respect, the reasoning contained in the remarks of Chao Hick Tin JA under-considered the nature of service of compulsory process. Customary international law requires in the absence of permissive consent by the foreign state that service of compulsory process should comply with official means. Much of the provisions of O 11 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) satisfies these requirements but some do not. One cannot also lose sight of the modern clarification and relaxation of the requirement of service out of originating process in *Abela v Baadarani* [2013] UKSC 44 at [53], *per* Lord Sumption. Courts will no longer insist on strict compliance with O 11 r 4 but will condone compliance in the spirit. Arguably, however, these relaxations do not extend to service of compulsory process or coercive orders which must still strictly conform to public international law principles of territoriality.

45 *Burgundy Global Exploration* is of more general application for another reason. Lord Hoffmann's speech in *Société Eram Shipping* made reference only to two specific principles of international law. As was said, this was that there is no jurisdiction to seize property in another state and no jurisdiction to punish another state's subject for acts done by him outside the forum state. There are clearly other well-established international law principles of criminal jurisdiction, sometimes referred to as the classical principles. Public international law approves of assumption of extraterritorial national prescriptive jurisdiction on the additional and alternative bases of protection against acts of non-nationals which are harmful to national security, protection against harmful acts of non-nationals aimed at nationals and "prosecution" of universal crimes.[120] Against this backdrop, the absence of proof in *Burgundy Global Exploration* that the person to be compelled to attend as a witness of fact was a subject of the domestic forum state and the fact that violation of the order would not necessarily be criminal are important clues to the reach of the reasoning of the court. They show that the principle of substantive jurisdiction in *Burgundy Global Exploration* could not have been a classical principle of international jurisdiction. Rather, it was the principle of reasonable jurisdiction applicable to conflicts of regulatory state interests.[121] This difference explains why it is suggested that the case is an important addition, and not a mere application of the specific principles approved in *Société Eram Shipping*, to the jurisprudence of enforcement jurisdiction.[122] What seems clear is the same willingness as in *Société Eram Shipping* to internalise customary international law principles of international jurisdiction, albeit without drawing explicit attention to it.[123]

46 Such recourse to international law brings considerable advantages. It will be a step towards ensuring that all countries apply the same or a uniform rule when it comes to the use of legal coercion in ensuring compliance with the law. In addition, such a solution to

120 See *SS Lotus (France v Turkey)* 1927 PCIJ (ser A) No 10 (Sept 7), where the Permanent Court of International Justice appeared to cast doubts on the cogency of the classical principles of jurisdiction.

121 See *Restatement of the Law: The Foreign Relations Law of the United States* (American Law Institute, 1986) at pp 237–258; see also *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Rep 3.

122 *Cf* Zhuang WenXiong, "*Burgundy*, the Bifurcation of Jurisdiction and its Future Implications" (2015) 27 SAcLJ 207, which argues for its extension to the adjudicative jurisdiction.

123 Lord Denning once declared that the customary international law is part of the common law but there are doubts whether this is correct when expressed in such unqualified manner.

conflicts of regulatory interests is preferable to a discretionary formula in terms of comity. As Lord Millett said in *Société Eram Shipping*:[124]

> The near universal rule of international law is that sovereignty, both legislative and adjudicative, is territorial, that is to say it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals. But in terms of domestic law these limits are self-imposed. A sovereign legislature has power under its domestic law to disregard them and a court of 'unlimited jurisdiction' (that is to say one which has power to decide the limits of its own jurisdiction) cannot be said to lack power to do so. Where the court observes the limits imposed by international law it may be a matter for debate whether it has no jurisdiction or has a jurisdiction which it refrains from exercising as a matter of principle. But it needs to be appreciated that, whether the court disclaims jurisdiction or merely declines to exercise it, it does so as a matter of principle and not of discretion.

47 There remains only the question of whether there are sound reasons for requiring the court to have substantive jurisdiction to make a contempt order directly implicating third parties outside the jurisdiction. Six reasons support this. The first has to do with the peculiar nature of a contempt order, namely, a contemnor cannot be heard as of right in court until and unless he purges his contempt. This prolongs the impact of the order even when the order should not have been made in the first place. The second is that the impact of the order on third parties is, therefore, so much greater than in the case of a *Mareva* order. Third, it is doubtful if third parties can reasonably effectively be protected by the court exercising self-restraint for the sake of comity and imposing an appropriate *Babanaft* or other proviso. In the case of a contempt order, any interference with the order is so much more serious since it amounts to criminal contempt and any exposure to the risk of being found in criminal contempt is also so much higher since, as has been said, the order cannot be challenged collaterally as of right without the contempt being purged beforehand. These observations are especially true of a contempt sanction such as the Chinn Assignment. If the domestic court is asked to order such an assignment, its impact on the nominee legal owners of the bank deposits who are third parties in relation to the contempt sanction can hardly be ignored. In fact, it would be wrong to regard the nominee legal owners as merely a mouthpiece of the defendant beneficiary and thereby ignore that there should also be sufficient connection to make an order in effect against them.

124 *Société Eram Shipping Co Ltd v Cie International de Navigation* [2004] 1 AC 260 at [80]. In the present view, there is no significance in the omission of the enforcement jurisdiction in these remarks.

48 Fourth, ultimately, the real impact of the contempt order is felt by the third party. Against a disobedient party, the contempt order is seldom needed. Courts have a wide array of sanctions to ensure that there will be no incentive to disobey but every incentive to comply with a coercive order. In most cases, courts can: (a) apply the adverse presumption, treating the contested facts as established against the disobedient party; (b) dismiss his claims; (c) grant judgment in default against him; and (d) order payment of costs against him without having to hold the disobedient party in contempt. The contempt order, however, seems to be the only real sanction against third-party interference. But what is the non-party to do if where he is resident it is lawful for him to conduct himself in a certain manner but the order now requires him not to conduct himself in that manner? Fifth, even where the court has *in personam* jurisdiction over the contemnor, the alternative discretionary exercise or declination of jurisdiction by reference to comity is an insufficient response to a mandatory contempt order. In the case of a prohibitory or restraining order which is issued contrary to international comity, disobedience will not constitute contempt of court. But a contempt order or sanction is (in substance) mandatory, compelling positive action and without a cross-undertaking in damages. A stronger response in terms of want of substantive jurisdiction is more proportionate to the higher dangers of prejudice and irreversibility. Sixth, in any event, if the contempt order will in fact be enforced, there should be international jurisdiction for the enforcement. This is because of the need to have a uniform standard applicable wherever the litigation may take place so that conduct is not criminal in one country but criminal in another (Singapore) or criminal in both countries (so that the person is damned whether he obeys the Singapore order or does not obey). Only international law, of course, furnishes that uniform standard.

49 Of course, the requirement of substantive jurisdiction will not eliminate all conflicts since sufficiency of connection may be assessed differently by different courts. This prospect that not all conflicts will be eradicable alone is not enough to nullify the above-mentioned arguments. In time, a more selective prioritising criterion may evolve but until that happens, the court will have additional recourse to international comity to achieve the necessary accommodation and degree of fine-tuning. The alternative suggestion of relying solely on international comity could be made but it is discretionary, particularised, applied on a case-by-case basis and leaves too much uncertainty. As a subsidiary principle, however, its availability will be useful to resolve the conflicts which are left after the requirement of substantive jurisdiction has been met.

E. Recognitional gloss?

50 When the recognitional analysis was rejected earlier in this article,[125] it was mentioned that the arguments for rejection would be more fully elaborated when considering the merits of adopting a jurisdictional analysis. The jurisdictional analysis has just been preferred, and the fourth question now falls to be answered. Are the same jurisdictional principles applicable when the domestic court is presented with a foreign court order and asked to enforce it in some sense? Is there or should there be a recognitional gloss in this jurisdictional analysis? This means an engrafting of the principle of finality and conclusiveness of the merits which marks out the recognition of foreign judgments as judicial acts. For the avoidance of confusion, it should be clarified that the term "international jurisdiction" is used in recognition of judicial act cases to describe the requirement of *in personam* or *in rem* jurisdiction to adjudicate a personal and proprietary cause of action respectively. These requirements are prescribed not by international law but by the common (domestic) law of the enforcement (domestic) forum. The jurisdictional analysis applicable to orders falling within the enforcement jurisdiction posits international law requirements of substantive or subject-matter jurisdiction. Perhaps unfortunately, these requirements are also described as requirements of international jurisdiction. But conflation is to be avoided. Both the provenance and contents of an enforcement order are different in that they respond to an act within the enforcement jurisdiction of international law, as opposed to an act within the adjudicative jurisdiction. The recognition of another country's judicial act may be coercive in the sense that the execution of an enforceable foreign judgment may be had against his property against his consent. But even then, the forcible deprivation of property in the domestic forum consequential on recognition does and will not involve the use of force against the person unlike the foreign coercive order which, when disobeyed, is a contempt of court. Nor does it implicate any extraterritorial invasion of another country's sovereignty. It would not be sensible, in other words, to superadd the very different requirements of international jurisdiction which apply to recognition cases. The question is whether the principle of finality and conclusiveness in such cases can be engrafted onto cases within the enforcement jurisdiction as a limited recognitional gloss.

51 It would be difficult to imagine a more revolutionary proposal than this if the coercive order was of an interlocutory nature. It would require the domestic court to exercise its own jurisdiction to issue an equivalent order matching the foreign coercive order and to supervise,

125 See paras 26–35.

in substance, the performance and observance of obedience to or compliance with the foreign order.[126] Why should the domestic court do so when the order is variable or subject to modification or discharge in the foreign court? If discharge might only be done in the foreign court, the domestic court would be in danger of acting out alignment with and in ignorance of the latest events unless appropriate undertakings to inform the domestic court were required of the applicant. Even if undertakings were expedient, the fundamental objection would be the futility of according finality through recognition to interlocutory orders.

52 Kim Pham, however, has argued that Australian courts have recognised and enforced foreign *Mareva* orders[127] and that this is consistent with *Pro Swing Inc v Elta Golf Inc*. He maintained that *Davis v Turning Properties*[128] starkly illustrates this. *Davis v Turning Properties* employed exactly the same arguments in *Pro Swing Inc v Elta Golf Inc* for seemingly recognising a foreign *Mareva* order.[129] It is submitted, however, that the key consideration in the Australian case was that the court considered that a domestic *Mareva* order could have been obtained in the first place in the usual way from the domestic court. If the analysis supportive of the foreign *Mareva* order were purely recognitional, there should have been no additional concern with the jurisdiction of the domestic court. The court was, in substance, exercising the usual domestic *Mareva* jurisdiction when it made the domestic order. For the purposes of the domestic jurisdiction, all that was necessary was to consider as datum the exclusion of assets in Australia from the scope of the foreign *Mareva* order and to grant a domestic *Mareva* order to cover those assets. There was no accord of finality to the merits of the foreign order such as would indicate that the court was truly recognising the foreign *Mareva* order.

53 There are a few other cases to consider. *Schemmer v Property Resources Ltd*, it will be recalled, only superficially seems to be an authority for a limited recognitional analysis. The case shows that assuming that the question is one of recognition, the domestic court will not recognise the title of a receiver appointed by a foreign court with insufficient connection (or lacking in subject-matter jurisdiction to use the modern terminology) to the defendant for the purposes of taking

126 In the present view, there is no question of the domestic court enforcing the order by domestic committal for contempt of the foreign order.

127 Kim Pham, "Enforcement of Non-monetary Foreign Judgments in Australia" (2008) 30 Syd L Rev 663.

128 [2005] 222 ALR 676.

129 *Cf Credit Suisse v US District Court for Central District of California* 130 F 3d 1342 (9th Cir, 1997).

possession of the defendant's assets.[130] It is important, however, to notice that this supposed notion of recognising the title of a receiver is limited to the receiver's title to sue to enforce pre-existing rights arising from his seizure of the contested property in the foreign state. Even then, there is in fact no recognition of finality of the merits in the receiver's claim nor, apparently, is the foreign order of appointment taken as conclusive of the merits of appointment. The domestic court continues to be free to examine those merits, upon evidence of irregularity.[131] Perhaps more significantly, the foreign receiver is and remains accountable to the foreign court and not the domestic court throughout all material times. Another way of expressing the point appears in *Derby & Co Ltd v Weldon (No 6)*, where the English Court of Appeal explained the case as indicating that the domestic court is unwilling to support the foreign appointment by exercising its powers save in the very limited circumstances approved by international law.[132] The foreign court is free to make its coercive order against persons in accordance with the doctrine of international jurisdiction and to punish such persons as disobey or interfere with its administration of justice within the territory of the foreign state. Besides that, the domestic jurisdiction may be invoked by the foreign receiver if he has a cause of action in his own name and right. This assistance is purely jurisdictional and, in this respect, is the usual assistance available to any plaintiff claiming *in personam* rights in his own right against a defendant over whom the court has jurisdiction. The domestic court neither imposes on the foreign receiver duties as an officer of the domestic court nor provides substantive rights not already vested in him.

54 The foregoing point can more forcefully be made by noting the contrast between *Derby & Co Ltd v Weldon (No 6)* and *Re Maudslay, Sons & Field*.[133] The former is an authority that the domestic court with unlimited jurisdiction will do what it can to make its own order effective by making orders *in personam* against persons subject to its jurisdiction. What of a foreign order which is a limited jurisdictional order? The latter is authority that the domestic court will not hold a person or a party to the domestic suit to be in contempt of its order appointing a receiver as to a debt situated in France where, by the law of France, such person is perfectly entitled to bring attachment proceedings in France

130 At *Schemmer v Property Resources Ltd* [1975] 1 Ch 273 at 287, Goulding J said that he would not attempt to define the class of cases where the court might directly recognise the title of the foreign receiver to assets located in the domestic forum or set up an auxiliary receivership in the domestic forum. It was clear that in two of cases he dealt with the receivers were essentially trustees in bankruptcy who were vested with title to the bankrupt or insolvent's estate.

131 See *Houlditch v Marquis of Donegal* (1834) 8 Bli NS 301.

132 *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139 at 1150.

133 [1900] 1 Ch 602.

claiming a competing right to the debt. This is because the receivership order does not of itself put the receiver in possession of French property or vest title to the debt in him. In the converse situation, one can easily suppose that the domestic court will, likewise, treat a foreign receiver and deny that he can invoke the domestic court's assistance and hold someone in contempt in bringing competing proceedings in the domestic forum to relevant assets comprised in the foreign order or seek to dismiss the domestic proceedings. The authority is a strong one because that was a case where the receivership order was made pursuant to a consensual charge contained in the debenture deed. However, no one supposed that there was any difference between an involuntary receivership and voluntary receivership. No one particularly suggested that, in the latter instance, the receiver could sue in the name of the debtor on the basis of a consensual authority or power of attorney to bring the domestic proceedings. It is submitted on the basis of *Re Maudslay, Sons & Field* that a recognitional analysis would ignore the important consideration that the interests of comity as presently conceived do not require the domestic court to do what it can to make a foreign order effective by lending the domestic court's contempt powers, nor do they oblige the domestic court to co-operate to make the order effective by giving the foreign receiver standing to sue in the domestic court. The case of the trustee in bankruptcy, it will be recalled, is different. He has title to all the property of the bankrupt and sues to enforce the bankrupt's pre-existing rights in the domestic court by virtue of his title. Suppose a foreign order appointing a receiver. No title to property of the debtor is vested in a receiver,[134] nor will the foreign order be regarded as vesting possession of property comprised in the order in the receiver. Unless, therefore, he has authority to sue in the name of the debtor either by virtue of statute or with the express consent of the debtor so that he has authority to bring proceedings in his name, the receiver cannot be heard in the domestic court in the right of the debtor.

55 For the sake of argument, aside from comity, should such a receiver (or more to the point, a sequestrator) be recognised as having authority to sue in the domestic court as auxiliary receiver or sequestrator in the name and right of the debtor or defendant, as the case may be? Admittedly, adoption of a limited recognitional analysis along the lines laid down in the Supreme Court of Canadian would be tempered by the court's discretion to refuse recognition to a foreign coercive order, where the foreign order adversely affects rights which are accorded under the domestic *lex fori* or prejudices local creditor rights. It is submitted that a stronger reaction is called for. A purely jurisdictional analysis is more strongly protective of such rights and, hence, a more appropriate principled approach than the discretionary

134 See *Re Maudslay, Sons & Field* [1900] 1 Ch 602 at 611.

qualification affixed to the recognitional. It leaves the order of a foreign court of international jurisdiction free to operate in its own tenor. Unless the foreign order violates the penal law or confiscatory law rules,[135] the domestic court will not block it, nor will it give effect to it or enforce it by furnishing affirmative assistance through committal for contempt proceedings. The foreign court order will merely be permitted to command obedience from the person to whom it is addressed in relation to the foreign court or who has notice of it unless the latter is entitled to rights which should be protected. A case of some relevance is *X AG v A Bank*.[136] In that case, the US Department of Justice ordered the head office of a US bank to produce documents relevant to its investigations, which were held with the bank's London branch. The branch owed duties of secrecy with respect to these documents to its customer, who had obtained from the domestic court an interim injunction restraining the bank from making disclosure. In deciding whether to continue or discharge the injunction, Leggatt J considered that the balance of convenience was for continuation of the injunction, in particular because compliance with the US order would render the bank liable to its customers for breach of its duty of secrecy. What seems clear is that the court did not ask whether the US order should be recognised or refused recognition. It accepted it in the sense that it would not frustrate it by retaliatory measures. If, however, the order were without international jurisdiction, the domestic court would not accept it however meritorious, and will block it if necessary.[137]

56 The final point to be made is that a purely jurisdictional analysis is necessary to give definite and effective expression to the domestic court's concerns about non-justiciability, whereas a limited recognitional analysis involving the exercise of discretion to refuse recognition would gloss over them. So far, from according finality of merits to a foreign order, the domestic court should consider whether or not to permit an order to operate against persons within its jurisdiction if the order purports to dispose of non-justiciable matters. For instance, if a foreign order is made compelling the contemnor to convey disputed title to

135 See the discussion at para 21.

136 [1983] 2 All ER 464. Properly understood, the case does not negate the proposition that the doctrine of subject-matter jurisdiction also regulates the international competence of a foreign court or executive or legislature to issue an extraterritorial coercive order.

137 This case is not authority adverse to the universality of a requirement of subject-matter jurisdiction which, since that case, was decided has gained clear judicial acceptance at the highest level. As then understood, there would have been subject-matter jurisdiction to compel a bank to produce documents held at an overseas branch since a branch has no separate legal personality from the head office. The case would, thus, be answering the different question of the extent to which a coercive order not lacking subject-matter jurisdiction should be precluded in the court's discretion.

property situated at all material times in the domestic forum, the domestic court should consider whether the absence of regard to comity in the foreign court should be met by intervention to block the order.[138] A jurisdictional analysis will require the domestic court to consider whether it would have had jurisdiction to decide the non-justiciable matter if it had been seized of the proceedings in the first place to issue the order. In the case of a contempt order, the conclusion is more likely than not that the domestic court will not issue a contempt order in relation to a dispute which is primarily or substantially non-justiciable. *Black Point Syndicate Ltd v Eastern Concessions Ltd*[139] may be used as an authority justifying or supporting the point. That was a case in which the plaintiffs sought an injunction to restrain the defendants from breaching their implied covenant of quiet enjoyment of foreign immovable property. Stirling J entertained considerable doubts whether the court had jurisdiction to grant the injunction having regard to international comity but, in any case, held that the court should exercise great caution in granting an injunction which "would occasion continual applications to [the domestic] court for contempt".[140] He thought that the proper court to issue the injunction was the foreign court. There is no doubt also that making a contempt order in relation to a territorially non-justiciable matter would only occasion continual applications for contempt and that a jurisdictional analysis would better keep out such order than a recognitional analysis.

57 The same, it is submitted, is true of a foreign order which is non-justiciable for reasons of act of state. Although the forum's own act of state will seldom be non-justiciable in a domestic court, the domestic court cannot ignore it when confronted with a non-justiciable foreign act of state. A foreign freezing order, for instance, is a foreign act of state and the domestic court will dismiss any attempt to seek injunctive or declarative relief against a person in the domestic forum; it certainly will not enforce it through domestic committal proceedings.[141] With reference to the particular facts in *ROP v Maler Foundation* and a fact about the Chinn Assignment not explicitly elicited in the judgment, there should not be serious doubts that the claims made by the HRVs would have been dismissed for act of state non-justiciability if the point had been taken. The fact not elicited may be found in the American case of *Credit Suisse v Merrill Lynch* previously mentioned: "[t]he [Chinn]

138 Again, a domestic court will issue a *Mareva* injunction affecting assets in a foreign country although the *Mareva* injunction will not be recognised in that country. There is no hardship for the party against whom the *Mareva* injunction is granted because disobedience in that country will not be contempt of the domestic court.

139 (1899) 79 LT 658.

140 *Black Point Syndicate Ltd v Eastern Concessions Ltd* (1899) 79 LT 658 at 661.

141 See *Credit Suisse v US District Court for Central District of California* 130 F 3d 1342 (9th Cir, 1997).

assignment directs entities having authority over such bank accounts 'to perform all necessary acts to effect the transfer of the above bank accounts forthwith.'"[142] So if the HRVs had sought declarative relief that WestLB was bound to hand over the deposit money to them, the domestic court would have refused the relief for act of state non-justiciability. A jurisdictional analysis gives adequate attention to such concerns, whereas a recognitional analysis would give it scant consideration.

VI. Choice of law analysis

A. The problem

58 The conclusion just arrived at is that the jurisdictional analysis is to be preferred to the recognitional as a standard of judging the conflictual relevance of a foreign coercive remedy in general and a foreign contempt order in particular. As a corollary, it has also been argued that a limited recognitional gloss should be rejected. There remains the choice between the jurisdictional and choice of law analysis to consider. Before that is done, the logically diverse lines of inquiry undertaken under a choice of law reasoning should be recalled. Choice of law rationality involves imputing pre-eminence to one exclusive applicable law for the sake of attributing legal effects and consequences to facts in issue. This task under jurisdiction-selecting methodologies is performed by localising or assigning a conflict-relevant occurrence in or to a community or legal order. Result-selecting methodologies pay little or no attention to such localisation, considering and evaluating instead significant actual policies or interests underlying relevant laws before selecting the law to be applied. All the same, the common goal is not directly to decide the rights and wrongs but indicate how and where they should be found. No small number of judicial enunciations have already pronounced that jurisdiction-selecting methodologies comprise multiple components (characterisation, selection of connecting factors and identification of the applicable law tied by the connecting factor selected to the characterised issue) to be approached holistically since each component is underscored by the same need to accommodate comity and practical justice.[143]

142 *Credit Suisse v US District Court for Central District of California* 130 F 3d 1342 at 1348 (9th Cir, 1997).

143 See *Raiffeisen Zentral Bank Oesterreich v Five Star Trading* [2001] QB 825 at [26]–[27]. This comity is of a different order from what has been seen thus far. It is not the conflict of state authority but the conflict between the private legal orderings that is at stake. Comity exhorts that the differences are taken as they are and as providing the datum for assessing the needs of the interests in justice as between the parties in dispute.

59 These complexities were not absent in *ROP v Maler Foundation*. Speaking generally, in applying the choice of law analysis to involuntary transfers, courts will be mindful that party autonomy is not a compelling consideration and, hence, will also not be inclined to a contractual characterisation of the issue between the parties.[144] Furthermore, if what is essentially at stake is an issue of property rights, courts applying choice of law analysis will as a general rule prefer to determine the issue of title by the *lex situs* or the proper law of the chose in action.[145]

60 Should this analysis be preferred where an involuntary beneficial assignment is ordered as a sanction for contempt of court as in *ROP v Maler Foundation*? It is submitted that the answer is "no". The choice of law problem in that case would not be to work out the binding effect, if any, of the assignment as between the HRVs and WestLB so much as to ensure that there would be no irreversible effects which might leave the nominee legal owners or any other implicated third party at risk of unexpurgated legal liability. As to that critical consideration, there is serious potential conflict between three governing laws which the choice of law analysis cannot satisfyingly avoid. These are the laws governing the: coercive assignment; nominee legal owners' obligations toward the defendant estate; and nominee legal owners' rights to the legal chose in action. The choice of law analysis, having been designed to select one exclusive law, is unable to choose between three equally compelling laws. The answer, it is submitted, already lies within the jurisdictional analysis.

B. Why jurisdictional analysis with subsidiary choice of law

61 In the lengthy jurisdictional discussion that was previously undertaken, this article implicitly rejected re-characterisation of an *in personam* beneficial transfer as substantially an *in rem* order subject to the particular international law rule invoked in *Société Eram Shipping*. However, it does not follow that the domestic court must enforce a

144 See *Raiffeisen Zentral Bank Oesterreich v Five Star Trading* [2001] QB 825.

145 Applying the *lex situs* rule promotes certainty of title in the country of situs and ensures enforceability of the *in personam* judgment. This is regardless whether the transfer is voluntary or involuntary. The disagreement is between those who advocate that the situs is where a transfer is effective (whose law governs its existence) and that the situs is the law which governs its creation. Thus, *Dicey, Morris & Collins on the Conflict of Laws* vol 2 (Sweet & Maxwell, 14th Ed, 2006) r 120 propounds that the governing law is the former. James J Fawcett & Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 2nd Ed, 2011) at para 13.21, however, questions the authorities cited in support. A central authority is *British Nylon British Nylon Spinners Ltd v Imperial Chemical Industries* [1953] 1 Ch 19, which will be discussed in paras 64–70 for a different proposition.

contempt order affecting beneficial rights. Take a foreign sequestration order against an equitable chose in action which is to be enforced domestically by the sequestrator. If there is substantive jurisdiction for the foreign court to make the order, the domestic court will permit him to notify third parties in the domestic forum without restraint. But to allow him to avail himself of the domestic legal process so as to make that order effectual would go appreciably beyond what the authorities sanction. It would amount to saying that the Chinn assignee, assuming him to be a sequestrator, should be regarded as akin to a trustee in bankruptcy. A lesser conclusion that the Chinn assignee should be recognised as having authority to sue for the deposits in the names of the nominee legal owners would amount to an unjustifiable generalisation of *Schemmer v Property Resources Ltd*.

62 As previously demonstrated, the domestic court also has jurisdiction to protect rights which have accrued under the *lex fori* against the sequestrator who has submitted to the jurisdiction in bringing proceedings in the domestic court.[146] Rights accrued under the *lex fori*, obviously, must be protected. Arguably, it would also be appropriate to protect rights which have accrued under foreign law. These are, of course, rights which are ascribed under the domestic court's choice of law process of imputing applicable law. That the court should exercise its jurisdiction to protect accrued rights under foreign applicable law is appropriate for several reasons. First, it reflects the important point that there is a *de novo* creation of beneficial rights in a transfer of beneficial rights as a contempt sanction capable of undermining pre-existing accrued foreign law rights of the contemnor or an implicated third party. To subject the transfer under a purely jurisdictional frame of reference to only the substantive *lex fori* would seriously underestimate the need to balance the rights between the sequestrator and the contemnor or implicated third parties. Second, choice of law considerations may or may not have been accounted for in the foreign court and the domestic court ought not to act on a presumption that choice of law has been considered. Even where the foreign court imposing the foreign order has taken choice of law as considerations of comity into account, such comity is essentially a principle of self-restraint on the part of the foreign court. There is no international consensus on how this self-restraint is to be exercised and no reason for the domestic court to defer to the notion of self-restraint, which has commended itself to the foreign court. The domestic court, in other words, ought to decide for itself the appropriate level of self-restraint which it will exercise on its own part. Third, requirements of comity change over time and while recourse may perhaps be made to discharge the foreign order by bringing proceedings in the foreign court

146 See para 54.

on the basis of such changes, there ought not to be an interval of vulnerability where the change cannot be reflected in the domestic court. This is provided that such changes also implicate the domestic court's principle of comity. Fourth, a contemnor or an implicated third party who seeks protection of beneficial property rights in the forum against the sequestrator seeks to make an affirmative claim in the domestic court. Such claim is founded on a lack of universalism of equitable rights. Each forum's notion of equitable rights is different in theory. There is no reason that the lack or presence of equitable notions in the foreign court should be conclusive or should preclude appeals to the domestic court's notion of equity or that of the applicable law. The issue to be decided falls to the domestic court and should be decided in accordance with its substantive *lex fori* or its choice of law rules as the case may be.

63 But now comes the question whether the contemnor or third party in a case such as *ROP v Maler Foundation* would have an affirmative claim for protection deserving of intervention by the domestic court through an embedded choice of law analysis. It is submitted that there is an affirmative answer. In such a case, the Singapore court can properly regard the implicated nominee legal owners as third-party trustees and the Chinn Assignment as possibly establishing a sub-trust if its choice of law analysis produces this result. As mentioned before, a contempt sanction depriving the contemnor of his beneficial interest may be a calling for the execution of the primary trust under which the ultimate beneficial interest of the HRVs exists.[147] It is not possible to say of a certainty that the sub-trust was merely passive and that the contemnor beneficial owner dropped out, leaving the primary trustees to answer to the Chinn assignee directly. Only the choice of law rules of the domestic court can provide a confident answer that the primary trustees' duty to terminate the deposits was no longer owed to the contemnor beneficial owner but the Chinn assignee. In any case, the HRVs were going up against the primary trustees, who were claiming in their own legal right as owners of the deposits and, implicitly, in refutation of the HRVs' beneficial interest. The HRVs, therefore, needed to assert that they could claim the beneficial interest without joining the Chinn assignee in addition to asserting that the contemnor had dropped out of the primary trusts. To elaborate, they needed to show that, being absolutely entitled to the beneficial interest, they had power to intervene directly in the primary trusts and, in particular, to direct the primary trustees to claim the deposits on their behalf. If, alternatively, there was no dropping out and the HRVs needed to terminate the primary trusts in order to obtain legal title, they should need to direct the primary trustees to transfer the legal title without

147 See para 13.

terminating the trust. That would, in turn, depend on whether the primary trustees would, under the applicable law of the trusts, be in breach of trust when doing so. Under these circumstances, the HRVs would not be raising a pure defence of being a beneficial owner against claims in denial brought by the primary trustees. They would need to make an affirmative claim by seeking an appropriate order from the domestic court. If no order was sought, the opposing contemnor or primary trustees could seek protection from the domestic court against being compelled to commit breach of trust by insisting on a specific order to issue whether for or against the claim. The question, in short, would be whether the contemnor or trustees had rights which were exercisable in the domestic forum and whether the domestic court would permit the HRVs' exercise of their rights in relation to the sub-trust to the prejudice of the contemnor under the applicable law of the trust. There is a stronger argument of protection for the primary trustees. Those trustees, not otherwise subject to the jurisdiction of the coercing foreign court, could not and ought not to act without a specific order of the court to whose jurisdiction they were amenable.

64 If authority is needed that the jurisdictional analysis with a subsidiary choice of law reference is correct or appropriate, there can presently be no better case than *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd*[148] ("*British Nylon Spinners*"). That was a case where the plaintiff sued the defendant in England for specific performance of a contract assigning all rights to an English patent which the defendant held. The problem was that those rights were, in turn, derived from a contract between the defendant and an American company. The American company had succeeded in obtaining a US district court order that the defendant reassign all the rights to the English patent to the company. In order to ensure that its rights were effectively protected, the plaintiff obtained an interlocutory injunction from the English court restraining the defendant from parting with those rights in compliance with the US order. On the defendant's appeal, the order was upheld. The English Court of Appeal held that, not being amenable to the jurisdiction of the US court, the order made against the plaintiff which had the effect of qualifying or destroying his English rights was an extraterritorial assertion of jurisdiction. The court would reject the US order and intervene to protect the plaintiff's rights by continuing the injunction against the defendant.[149]

148 [1953] 1 Ch 19.

149 In a subsequent follow-up case, the High Court ordered specific performance against the defendant. See James J Fawcett & Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 2nd Ed, 2011) at para 13.21.

65 This judgment, it is true, stops short of pronouncing on an assignment of the beneficial interest. The order of the US district court under consideration was merely an order to reconvey or to take steps to reconvey and it did not appear that an immediate beneficial interest was thereby vested in the American company. Nevertheless, the case importantly affirms that while there are two principles involved, namely the doctrine of international jurisdiction and the doctrine of comity, the doctrine of international jurisdiction is paramount. The court will not balance sufficiency of connection as a requirement of international jurisdiction and exercise of discretion according to international comity. If there is no sufficiency of connection, it will not matter that comity would otherwise support respect for the order. If there is sufficiency, the court will balance the considerations of comity against the forum's interests. However, the court must never permit destruction of property rights under the *lex fori* in the name of comity.

66 The judgment, notably, is not confined to the protection of statutory rights but has a wider impact because it referred to and afforded separate treatment to both the general contractual rights to a licence and the statutory rights under an English patent. Lord Evershed MR, delivering the leading judgment, regarded the contractual right to a licence under an English patent, which was specifically enforceable, as a kind of property right which the forum courts were duty bound to protect. This shows that while the language of recognition of the US order is employed, as where the court said that it would not recognise the order in question, nothing like a true recognitional analysis was intended. To the contrary, the court scrutinised the merits of the US order to the extent that it ignored the prior rights of the plaintiff to an English patent.

67 In other words, the judgment approves of a limited choice of law analysis, not of the merits of the order,[150] but of the merits of the competing substantive claim which may have been ignored or omitted in the foreign court. This recourse to choice of law occurs under the management of the court with domestic jurisdiction. The choice of law is not a core function. Jurisdiction is core but where there are accrued rights to be protected, the court decides whether it has jurisdiction to protect such rights as are ascribed by its choice of law process. Where the order creates an immediate beneficial interest, this two-tiered analysis should equally be applicable. Thus, as explained in *Derby & Co Ltd v Weldon (No 6)*, the party with rights may invoke the jurisdiction of the forum court for protection of its rights.[151] This

150 This is albeit there is a careful appreciation of the scope of the foreign order.
151 *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139 at 1190.

orientation was also flagged in *Bucknell v Bucknell*,[152] where a small concession was allowed. In some instances, there may be no need to invoke the jurisdiction of the domestic court at all. In that case, the bank mortgagee, having sold off the mortgaged property and recouped its outstanding liabilities, held the surplus on trust for the contemnor. It was held that no further application to the court was necessary to enable the sequestrator to collect and get in the contemnor's equitable interest in the realised surplus proceeds, which was clear and absolute. The English Court of Appeal helpfully explained that there are situations where application would be necessary, such as where there are doubts or disputes about whether the chose in action which is to be got in is included in the order or about title of the contemnor to the chose in action in question. The court further acknowledged that other situations might call for issues to be put before the court by way of application for a specific order being insisted upon by the third party. It is acknowledged that insisting on such application means incurring costs of application to be defrayed out of the sequestrated contemnor's asset and could be a waste of time and money. This is clear where there is no special authority giving or acknowledging any special need for protection by a third party. However that may be, in the case where the execution of a trust has to be put before the court, there can be little doubt that its jurisdiction has to be invoked, if necessary, by the contemnor or the third party seeking a specific order from the domestic court. This is within the other situations contemplated in *Bucknell v Bucknell*.

68 Arguably, *British Nylon Spinners*' jurisdictional orientation to protect accrued rights is a little ambiguous as to what is the meaning of "invoking the jurisdiction for the protection of the defendant's rights". Invocation of the domestic court's jurisdiction could mean one of three things. One is that the court only intervenes if it has exclusive jurisdiction to protect those rights. The intervention, as a result, is restricted to intellectual property rights originating in the forum. On a narrow interpretation, the rationes in cases on involuntary assignments superficially support this meaning. The second meaning is the broader one that the court intervenes only if the subject property is forum property or property situated in the forum by applying its own law, the *lex fori*. In either case, if it is not appropriate to apply the *lex fori*, dismissal will be in order. The court should neither assist by providing access to legal process to the sequestrator to collect on the chose in action nor issue orders that the third party shall not comply with the foreign order. The third meaning is that the court intervenes to dispose of the substance of the rights protected according to its choice of law process. The presence of the property is not critical; and in the case of a

152 [1969] 1 WLR 1204; [1969] 2 All ER 998.

trust, the court will have jurisdiction if it has jurisdiction over the trustees to protect them or the beneficiaries in accordance with the trust's governing law as determined by the court's choice of law rules. It is submitted that the third possibility is the answer provided by *British Nylon Spinners* by extrapolation. Especially noteworthy is that the English Court of Appeal in that case made a conscious decision to extend the injunction protecting the rights worldwide. The agreement between the parties included non-English patents. No special point of distinction was made in relation to the non-English patents. Notwithstanding the absence of pleading and evidence of, for instance, Australian patent law, the court felt able to apply the presumption of similarity of laws and to allow the injunction to cover all patents in the schedule, English and non-English. This indicates that in the court's unarticulated premises, the relevant *lex situs* according to choice of law analysis was applicable. In the alternative, the injunction would in any case cover the general contractual right relating to all the scheduled patents. This further indicates the unarticulated premises that the proper law of the contract was relevant and that the equitable rights arising under the contract were to be protected.

69 There are two other cases which have an indirect bearing on the present discussion and should be mentioned for the sake of contrast and comparison. The notion of a two-tiered analysis is not novel. The old case of *Simpson v Fogo*[153] shows the intermingling of recognitional and choice of law analyses when a judicial act is contrary to public policy. The intermingling is exceptional but not a forbidden analysis. The second case is *Peer International Corp v Termidor Music Publishers Ltd*.[154] This case indicates that a foreign confiscatory law will not be effectual in divesting existing rights to English copyrights on grounds of public policy, even assuming that the forum shares in the policy of the foreign law. Protection against foreign confiscation of English property rights is absolute and, at any rate, choice of law analysis based on comity will not be allowed to undermine that protection. An intermingling of recognitional and choice of law analyses as well as public law exclusionary rules and choice of law is evident in these refusals to countenance application of the foreign law which will destroy substantive property rights arising by virtue of the *lex fori*.

70 Finally, as a matter of principle, while courts have consistently eschewed importing equitable concepts in characterisation, they have also acknowledged that there is a proper place for regarding and protecting a pre-existing beneficial interest.[155] The decision in *British*

153 (1863) 1 H & M 195.
154 [2004] Ch 212.
155 The existence of a distinct and independent trust characterisation is proof.

Nylon Spinners is instructive in revealing the court's substantial approach. If a question of property is involved in or affected by a foreign order, there ought to be a separate and distinct choice of law analysis. With respect to pre-existing property rights, Devlin J in *Bank voor Handel en Scheepvaart NV v Slatford*[156] advised:

> [A] principle of private international law that allows property legislation to operate in the territory of another country, so far from being a principle which resolves the conflict of laws, will create a conflict which it will require the formulation of a new system to settle. There seems … to be every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other.

This statement of the policy of the law is against allowing a coercive order affecting property in the forum to operate in denial of property rights accrued under the domestic *lex fori*. It is submitted that the same policy is also against allowing it to operate against property, not in the forum at the material time but now in the forum, otherwise than in accordance with the domestic court's choice of law process.

VII. Conclusion

71 This article has examined three conflictual processes. They are logically diverse. One responds to the interest in finality (the recognitional analysis). Another responds to the interest in coercive harmony (jurisdictional analysis), and another the interest in material justice (choice of law analysis). Having regard to differences in process orientation and the nature of the Chinn Assignment as a contempt sanction, arguments have been developed for approaching coercive orders to enforce disobedience of a court order from a jurisdictional perspective. What makes the present problem different from recognition cases is that the domestic court is not asked to recognise the existence and validity of an act of state as a judicial act. The contempt sanction is an exercise of coercive jurisdiction and may be extraterritorial by international law. International law, therefore, prescribes the test of extraterritoriality, namely, the principle of sufficient connection or reasonable jurisdiction. Such orders are to be dealt with not in terms of abstention from exercising jurisdiction in cases which involve an attack on the validity of an act of a foreign nation state. They involve a different question of jurisdiction, the denial of jurisdiction to make orders in the absence of reasonable jurisdictional connection.

156 [1953] 1 QB 248 at 260.

72 There is a second feature to be stressed when the coercive contempt order compels an assignment of the beneficial interest from the contemnor, unlike a mere order appointing an equitable receiver which never vests possession of or title to property in him. It has been shown that such an *in personam* order made by the foreign court in the exercise of international jurisdiction can only effectively alter the beneficial ownership in accordance with the domestic court's choice of law rules.

73 To illustrate the arguments which have been made, let the following facts improvised from *ROP v Maler Foundation* be assumed:

(a) the assignment was coercive enforcement and not punitive enforcement and was made by the US district court, which had substantive or subject-matter jurisdiction to do so;

(b) the assignment under the foreign *lex fori* operated as a sub-trust and not by extinguishment of the trust or as substantially a receivership of an equitable interest;

(c) the nominee legal owners were subject to pre-existing trusts governed by Swiss law;

(d) in the context, WestLB having taken out an interpleader would not be exposed to liability, if any, for participating in a breach of trust;

(e) the Swiss law of trusts was not pleaded or no evidence of it adduced; and

(f) the Swiss court would reject the assignment on grounds of lack of international competence in the US district court to make the order.

58 On these assumed facts, the acceptance of the assignment in (a) alone would matter, the rejection mentioned in (f) would be immaterial, and the HRVs by asserting their beneficial interest in the interpleader proceedings in which the nominee legal owners also claimed title on behalf of the contemnor might arguably be taken to have invoked the court's jurisdiction to execute the trust against the legal owners who had submitted to the jurisdiction. Alternatively, the nominee legal owners might be taken to have invoked the court's jurisdiction over the HRVs who were present by submission to declare, assert and protect their rights in denial of the rights of the HRVs. In either case, jurisdiction to execute the trust of property now in the domestic forum would exist. The question of rights would depend on Swiss law presumed to be similar to Singapore law in the absence of

proof and pleading.[157] Under Singapore law, the HRVs not having previously terminated the trust could not assert their claims and the case might thereby be directly dismissed. Where, however, the Swiss law was pleaded and proved to be different from Singapore law, the presumption of similarity would be irrelevant. Suppose that under the proven Swiss law, the involuntary creation of a sub-trust by the defendant estate had the effect of bringing the HRVs as ultimate beneficiaries of the bank accounts into a direct relationship with the bank where the accounts were held, with the nominee owners dropping out. The jurisdiction to execute the trust in favour of the defendant estate at the behest of the nominee owners would not then exist and the beneficial claim of the HRVs would be valid.

157 See Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172.